Court File No. 39856

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF YUKON)

BETWEEN:

CINDY DICKSON

APPELLANT/CROSS-RESPONDENT
(Appellant)

AND:

VUNTUT GWITCHIN FIRST NATION

RESPONDENT/CROSS-APPELLANT
(Respondent)

AND:

GOVERNMENT OF YUKON, ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF ALBERTA

INTERVENERS

SINGLE FACTUM OF RESPONDENT ON APPEAL and FACTUM OF APPELLANT ON CROSS-APPEAL
(VUNTUT GWITCHIN FIRST NATION)

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada* and Order of Rowe J. dated August 30, 2022 permitting a single factum)

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PART I - OVERVIEW AND STATEMENT OF FACTS

> "Through our Final Agreement and Self-Government Agreement the Elders wanted us to go back to the traditional ways of our land-based governance they had known before the Indian Act where all major decisions affecting the Vuntut Gwitchin were made by the community together on our land. This direction from our Elders is seen throughout the agreements and our Constitution. The Elders wanted the importance of the land and maintaining our traditions to be stated in these guiding documents so that future generations of Vuntut Gwitchin who may not have grown up like them out on the land would be reminded and guided by these things. The Elders knew that the outside world was unpredictable and worried about hardships coming in the future, and they wanted future generations to remember that we can rely on our land and traditions."
>
> – Vuntut Gwitchin Elder Robert Bruce Jr.[1]

A. Overview

1. Vuntut Gwitchin have lived on and cared for their territory since the beginning of this world as they know it. Vuntut Gwitchin governance is inextricably bound to their land. In entering into a modern treaty and self-government agreement with Canada and Yukon, and in passing their own *Constitution*, Vuntut Gwitchin First Nation (**VGFN**) has reclaimed a space in which they can once again autonomously and collectively carry out their inherent authority to govern themselves on their own land in a manner consistent with their distinct legal order.

2. VGFN's selection of their leaders is an aspect of their inherent right to self-government. Consistent with their pre-colonial land-based Vuntut Gwitchin legal order, VGFN's General Assembly of Citizens included a residency requirement in their *Constitution*, requiring a successful candidate for their elected Council to reside in the Traditional Territory on Settlement Land ("**Residency Requirement**"). Most if not all other electoral jurisdictions in Canada have such a requirement. Nevertheless, the Residency Requirement is grounded in VGFN's distinct culture, laws, and values, including the principle that the seat of government must be located on the lands over which their inherent authority arises and is carried out.

3. The Appellant's claim is brought under the *Canadian Charter of Rights and Freedoms* ("***Charter***"), asserting that the Residency Requirement discriminates contrary to s. 15(1). VGFN

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[1] Affidavit of Robert Bruce Jr., sworn March 12, 2019 [**Bruce**], para 8, Appeal Record [**AR**] Vol. VI, Tab 5.9 at 113-114.

submits the claim is misplaced in law because the *Charter* is not applicable. Section 32 of the *Charter* does not capture an Indigenous governing body such as the General Assembly, which is not Parliament or a legislature and does not carry out authority delegated by those bodies. Instead, VGFN Citizens, in determining how leaders are selected, act collectively pursuant to VGFN's inherent authority. This core aspect of their self-government is grounded in their pre-existing sovereignty and laws. The agreements with the Crown that led to VGFN's reclamation of self-government are silent respecting *Charter* application. VGFN did not agree the *Charter* would apply. Instead, they enacted their own *Constitution,* which provides protection for individual rights of VGFN Citizens within contemporary VGFN self-governance.

4. In the event that the *Charter* is found to apply, s. 25 protects the Residency Requirement from the Appellant's *Charter* challenge. As a shield for aboriginal, treaty and other rights and freedoms of Indigenous peoples, s. 25 precludes *Charter* claims that would undermine or derogate from VGFN's protected self-government rights and freedoms.

5. The Appellant's claim should also be dismissed because the Residency Requirement is neither discriminatory nor disproportionate within the meaning of the *Charter.* It does not distinguish based on an enumerated or analogous ground and does not have the effect of perpetuating pre-existing disadvantage or prejudice contrary to s. 15(1). While it may impose a burden on a non-resident VGFN Citizen elected to Council, it is a proportionate limit that an elected leader is required to take on responsibility in a manner consistent with the legal and governance traditions of the peoples and the lands that they are charged with governing.

B. Vuntut Gwitchin First Nation and their Traditional Territory

6. Vuntut Gwitchin First Nation ("**VGFN**") is the "collectivity of Citizens who share the language, culture, and laws of the Vuntut Gwitchin, and their descendants."[2] Throughout their history, they have ensured their collective survival, dignity and well-being on their traditional

[2] Constitution of the Vuntut Gwitchin First Nation, as amended August 10, 2019 [***Constitution***], Affidavit #2 of Cindy Dickson, affirmed September 10, 2019 [**Dickson #2**], AR Vol. VIII, Tab 5.13 at 130.

territory ("**Traditional Territory**") by exercising their inherent rights and responsibilities in accordance with a distinct Vuntut Gwitchin legal order and land-based governance system.[3]

7. The Traditional Territory relied upon by the Vuntut Gwitchin for millennia encompasses a vast area in the northernmost region of what is now known as the Yukon.[4] At the turn of the twentieth century, the Vuntut Gwitchin community of Teechik (also known as "**Old Crow**") was established as a village site at the confluence of the Crow and Porcupine rivers.[5] Today Old Crow is the only permanent settlement within the Traditional Territory. Located 800 km north of Whitehorse, it is the northernmost community in the Yukon and most northwestern in Canada.[6] There are no all-season roads to Old Crow from outside of the Traditional Territory, so it is only regularly accessible through the year by passenger air travel.[7]

8. Many Citizens reside both in and outside the Traditional Territory over the course of their lives.[8] VGFN's government, with its seat in Old Crow, is the only government with a significant local presence that can address the critical needs of the community.[9] With its limited fiscal and human resources and remoteness from urban centres, VGFN focuses its programs and service delivery in Old Crow, where the greatest concentration of Citizens resides and where needs are greatest. VGFN also works to meet the needs of Citizens in Whitehorse and elsewhere and to advocate for opportunities for Citizens' well-being equal to other Canadians.[10]

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[3] *Dickson v Vuntut Gwitchin First Nation*, 2020 YKSC 22 [**YKSC Reasons**], paras 11, 44; Affidavit of Chief Tizya-Tramm, sworn March 13, 2019 [**Tizya-Tramm**], paras 12-16, AR Vol. VI, Tab 5.10 at 137-138; Bruce, paras 7-9, Exhibit A, AR Vol. VI, Tab 5.9 at 113-114, 116-133; Affidavit #2 of William Josie, affirmed October 2, 2019 [**Josie #2**], Exhibit A, AR Vol. VII, Tab 5.14 at 162-180, AR Vol. IX, Tab 5.14 at 1-161.

[4] Affidavit #1 of Cindy Dickson, sworn February 15, 2019 [**Dickson #1**], Exhibit I, AR Vol. V, Tab 5.8 at 120.

[5] YKSC Reasons, paras 8-9; Tizya-Tramm, paras 10-11, AR Vol. VI, Tab 5.10 at 136-137.

[6] Dickson #1, Exhibit J, AR Vol. V, Tab 5.8 at 122.

[7] YKSC Reasons, para 10.

[8] YKSC Reasons, paras 14, 44.

[9] YKSC Reasons, para 15.

[10] YKSC Reasons, para 44; Tizya-Tramm, paras 24-25, AR Vol. VI, Tab 5.10 at 140-141; Affidavit #1 of William Josie, affirmed March 13, 2019 [**Josie #1**], paras 23-25, AR Vol. VI, Tab 5.11 at 164-165; Josie #2, para 22, AR Vol VIII, Tab 5.14 at 161.

C. VGFN's remarkable achievement of reclaiming self-government

9. VGFN refused to accept the ongoing erosion of their land, culture and society caused by colonization and systemic racism, and through good faith political negotiations, sought a new relationship with the Crown based on recognition and respect for their inherent rights and their special relationship to the Traditional Territory.[11] VGFN's continuing legal and governance traditions have been given respect and recognition through a modern treaty and self-government agreement, which brought them into the "constitutional fabric" of Canada.[12]

1. The Agreements removed VGFN from under the *Indian Act*

10. The Umbrella Final Agreement framework (the "**UFA**")[13] was the result of a 20-year process of negotiation between Yukon First Nations, Canada and Yukon. This Court has described the UFA as a "model for reconciliation."[14] VGFN pursued this historic effort with the guidance and participation of elders, leaders, Citizens, negotiators and advisors together with other Yukon First Nations.[15] The UFA culminated in the monumental achievement of the Vuntut Gwitchin First Nation Final Agreement ("**Final Agreement**") and the Vuntut Gwitchin First Nation Self-Government Agreement ("**Self-Government Agreement**" or "**SGA**") (together the "**Agreements**") which preserved and validated VGFN's inherent right of self-government.[16] The primacy of the VGFN Constitution (the "***Constitution***") was a key outcome of the UFA and Agreements. The result of these efforts was VGFN's independence from the control historically imposed by Canada through s. 91(24) of the *Constitution Act, 1867* and the *Indian Act*.[17]

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[11] YKSC Reasons, paras 12-13, 208; Dickson #1, paras 4, 9, 20, 59-66, Exhibit C, AR Vol. II, Tab 5.8 at 54-55, 57, 64-66, 79; Dickson #2, para 9, Exhibit D, AR Vol. VII, Tab 5.13 at 32, 57; Tizya-Tramm, para 21, AR Vol. VI, Tab 5.10 at 139; Bruce, para 8, Exhibit A, AR Vol. VI, Tab 5.9 at 113-114, 116; Josie #2, paras 6, 14, Exhibit A, AR Vol. VIII, Tab 5.14 at 156-158, 162.
[12] YKSC Reasons, paras 131, 206.
[13] YKSC Reasons, para 206.
[14] *First Nation of Nacho Nyäk Dun v Yukon*, 2017 SCC 58 [***Nacho Nyäk Dun***], para 10; *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 [***Beckman***], para 10.
[15] YKSC Reasons, para 206.
[16] Vuntut Gwitchin First Nation Final Agreement [**Final Agreement**] in Dickson #1, Exhibit E, AR Vol. III, Tab 5.8 at 1; Vuntut Gwitchin First Nation Self-Government Agreement [**SGA**] in Dickson #1, Exhibit F, AR Vol. V, Tab 5.8 at 63; *Dickson v Vuntut Gwitchin First Nation, 2021 YKCA 5* [**YKCA Reasons**], para 11, AR Vol. 1, Tab 1.3 at 91; YKSC Reasons, paras 131, 206.
[17] YKSC Reasons, paras 57, 145, 152, 206; *Constitution Act, 1867*, 30 & 31 Vict, c 3.

11. The UFA and the Agreements are intended to establish a renewed relationship with the Crown that protects and promotes VGFN's distinct culture, way of life and relationship to the Traditional Territory. They were carefully negotiated by VGFN to ensure that the harm experienced as a result of the history and legacy of colonization under Canadian law would be addressed.[18] This renewal included the restoration of VGFN's ability to implement their traditional selection processes for Dinjii Kat Chih Ahaa[19] free from the "divisive and contradictory" *Indian Act* rules for leadership selection historically imposed on VGFN.[20]

12. Throughout the negotiations with the Crown, VGFN opposed terms that would apply the *Charter* to VGFN self-government. VGFN's decision not to consent to the application of the *Charter* was informed by their history and experience of colonization and assimilation under Canadian law. Their ability to self-govern in a manner consistent with their distinct legal order – and without the imposition of external values – requires abiding by their land-based governance system which, as a matter of survival, has always prioritized the collective welfare of Citizens and their relationship to the Traditional Territory.[21]

(a) VGFN Final Agreement

13. The parties to the Final Agreement intended to recognize and protect a way of life that is based on an economic and spiritual relationship between Vuntut Gwitchin and their lands, and to protect the cultural distinctiveness and social well-being of Vuntut Gwitchin. They also sought to achieve certainty respecting ownership and use of the Traditional Territory and in the VGFN-Crown relationship.[22] The Final Agreement makes no mention of the *Charter* and does not provide that the contemplated self-government arrangements would be subject to the *Charter*.

14. The Final Agreement is a land claim agreement within the meaning of s. 35(3) of the *Constitution Act, 1982*. The rights it contains are recognized and affirmed as treaty rights under s.

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[18] Tizya-Tramm, para 22, AR Vol. VI, Tab 5.10 at 139-140; Bruce, para 8, AR Vol. VI, Tab 5.9 at 113-114; Affidavit of Dave Joe, affirmed March 27, 2019 [**Joe**], paras 9-12, AR Vol. VII, Tab 5.12 at 3-5; Canada, Parliament, *House of Commons Debates*, 28th Parl., 4th Sess., Vol. 1 (1 Mar 1972) [**1972 Debates**] at 448; *Beckman*, paras 9-10.

[19] YKSC Reasons, para 207; See Josie #2, Exhibit A, AR Vol. IX, Tab 5.14 at 9, The English translation of "Dinjii Kat Chih Ahaa" from the Gwich'in language means "One Who Leads."

[20] Josie #2, Exhibit A, AR Vol. IX, Tab 5.14 at 131-132; YKSC Reasons, paras 11-12, 206.

[21] Joe, paras 5, 9, AR Vol. VII, Tab 5.12 at 2-3.

[22] Final Agreement, Preamble, AR Vol. III, Tab 5.8 at 64.

35(1).[23] The Final Agreement defines lands within the Traditional Territory as either "Settlement Land" or "Non-Settlement Land".[24] It includes terms for the cession, release and surrender of VGFN aboriginal rights in and to Non-Settlement Land in exchange for defined treaty rights. The Final Agreement does not exhaust VGFN rights: it preserves all other existing VGFN aboriginal rights including as they relate to Settlement Land and self-government.[25]

15. The Final Agreement acknowledges the relationship between Settlement Land and self-government, with the shared objectives of recognizing "the fundamental importance of land in protecting and enhancing a Yukon First Nation's cultural identity, traditional values and life-style and in providing a foundation for a Yukon First Nation's self-government arrangements."[26] Chapter 24 of the Final Agreement laid the foundation for the restoration of VGFN self-government by requiring Canada and Yukon to negotiate self-government arrangements with VGFN.[27]

16. The parties agreed that the negotiation of self-government arrangements would be "in conformity with the Constitution of Canada". This term was included in relation to the recognition of certain existing VGFN self-government "powers" including authority to enact VGFN laws "of a local nature for the good government of its Settlement Land and the inhabitants of such land" and for their general welfare and development.[28] Chapter 24 contemplated the VGFN *Constitution* would include: (a) composition, structure and powers of VGFN government institutions; (b) election procedures; (c) the rights of individual Citizens with respect to VGFN government powers; and (d) internal management of VGFN, including regional or district management structures.[29]

17. Although the parties have advanced the process, reconciliation between VGFN and the Crown under s. 35 is unfinished. The rights defined in the Final Agreement are "treaty rights." Still, VGFN maintains assertion of "aboriginal rights, titles and interests," other than those in

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[23] YKSC Reasons, para 45; Final Agreement, s 2.2.1, AR Vol. III, Tab 5.8 at 91; *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [***Constitution Act***], s 35.
[24] Final Agreement, Chapter 1, AR Vol. III, Tab 5.8 at 81.
[25] YKSC Reasons, para 46; Final Agreement, s 2.5.1, AR Vol. III, Tab 5.8 at 97.
[26] YKSC Reasons, para 53; Final Agreement, s 9.1.1, AR Vol. III, Tab 5.8 at 167.
[27] YKSC Reasons, para 47; Joe, paras 9-12, AR Vol. VII, Tab 5.12 at 3-5.
[28] Final Agreement, ss 24.1.2 and 24.1.2.1, AR Vol. V, Tab 5.8 at 1.
[29] YKSC Reasons, para 50; Final Agreement, s 24.5.0, AR Vol. V, Tab 5.8 at 4.

relation to Non-Settlement Land.[30] Terms were included to protect these continuing rights, including that nothing in the Final Agreement: precludes a party from advocating for the existence, scope, or nature of the relationship between the parties; or precludes VGFN from acquiring constitutional protection for their self-government rights and freedoms.[31] The Final Agreement further requires agreement for any amendments related to such constitutional protection.[32]

18. The parties to the Final Agreement specifically agreed that the exclusion of self-government arrangements from recognition as treaty rights should not affect the interpretation of VGFN's continuing aboriginal rights under ss. 25 and 35 of the *Constitution Act, 1982*.[33]

(b) VGFN Self-Government Agreement

19. The SGA was negotiated with the mutual intention of the parties: (a) to support and promote the contemporary and evolving political institutions and processes of VGFN; (b) to achieve certainty in the VGFN-Crown relationship; and (c) to protect a way of life that is based on an economic and spiritual relationship between Vuntut Gwitchin and the land.[34] The parties also intended for VGFN to have the ability to maintain their traditional decision-making structures, which VGFN desired to avoid replicating colonial constructs.[35] In the SGA, the parties committed to providing essential public services of reasonable quality and promoting opportunities for the well-being of Citizens equal to those of other Canadians.[36]

20. The SGA recognizes certain law-making powers of VGFN including: (a) exclusive law-making power in relation to VGFN's internal affairs including the management and administration of rights or benefits realized pursuant to the Final Agreement under VGFN's control; (b) law-making power over certain matters in Yukon such as provision of programs and services for Citizens including as they relate to spiritual and cultural beliefs and practices, healthcare, education and social well-being; and (c) law-making power over matters of a local or private nature on Settlement Land including protection of Settlement Land, administration of justice and matters

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[30] Final Agreement, Preamble, AR Vol. III, Tab 5.8 at 64; SGA, Preamble, AR Vol. V, Tab 5.8 at 67.
[31] Final Agreement, s 2.6.5, 24.12.2, AR Vol. III, Tab 5.8 at 99, AR Vol. V, Tab 5.8 at 7.
[32] Final Agreement, s 24.12.3, AR Vol. V, Tab 5.8 at 8.
[33] Final Agreement, s 24.12.4, AR Vol. V, Tab 5.8 at 8.
[34] SGA, Preamble, AR Vol. V, Tab 5.8 at 67-68.
[35] SGA, Preamble, AR Vol. V, Tab 5.8 at 67-68; Joe, para 11, AR Vol. VII, Tab 5.12 at 4.
[36] SGA, s 2.2, AR Vol. V, Tab 5.8 at 75.

coming within the good government of Citizens on Settlement Land.[37] The SGA further contemplates that VGFN would adopt their *Constitution* as their supreme law with all recognized VGFN self-government powers being subject to it.[38] The SGA, like the Final Agreement, does not mention the *Charter* and does not provide that VGFN's *Constitution* and law-making powers will be subject to the *Charter*.

21. The terms of the SGA did not include s. 35 recognition of VGFN's inherent right to self-government. The parties agreed to a number of general provisions intended to protect the rights, interests, benefits and abilities that Citizens hold collectively and individually in relation to the Canadian state. These include that the Agreement shall not: (a) affect any aboriginal claim, right, title or interest of VGFN or its Citizens; (b) affect the identity of Citizens as aboriginal people of Canada; (c) affect the ability of VGFN to exercise, or benefit from, any existing or future constitutional rights for aboriginal people that may be applicable to them; (d) affect the ability of Citizens to participate in and benefit from "Government" programs for "status Indians, non-status Indians or native people, as the case may be" (unless otherwise provided pursuant to the SGA or in a law enacted by VGFN); (e) affect the rights of Citizens "as Canadian citizens"; or (f) affect their entitlement to all of the benefits, services, and protections of other Canadian citizens (unless otherwise provided pursuant to the SGA or in a law enacted by VGFN).[39]

22. The SGA recognized "Vuntut Gwitchin First Nation" as a legal entity independent from the *Indian Act*, abolishing the former "Vuntut Gwitchin Tribal Band" (or "Old Crow Indian Band").[40] Council of the former *Indian Act* band was formally replaced by the governing bodies established by their Citizens following the adoption of the *Constitution* in 1992.[41]

23. Canada and Yukon each passed legislation (the "***Federal and Territorial Acts***") to approve and give effect to the terms of the Agreements, with consequential legislative changes that would "end the paternalistic colonial administration of Canada, as well as the discriminatory status/non-

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[37] SGA, s 13.0, AR Vol. V, Tab 5.8 at 86-95; YKSC Reasons, para 47, 60.
[38] SGA, s 10.0, AR Vol. V, Tab 5.8 at 83; *Yukon First Nations Self-Government Act*, SC 1994, c 34, ss 8(1), 9(1) [***Federal Act***].
[39] SGA, s 3.0, AR Vol. V, Tab 5.8 at 75.
[40] SGA, s 9.1, AR Vol. V, Tab 5.8 at 82.
[41] SGA, s 11.1, AR Vol. V, Tab 5.8 at 83.

status division created by successive governments of Canada based on the *Indian Act.*"[42] Canada's legislation reflects that VGFN's recognized self-government powers "shall" be exercised in accordance with their *Constitution.*[43] It confirms that the *Indian Act* ceased to apply to VGFN and that they are an independent legal entity.[44]

2. VGFN Constitution

24. At the same time as making the Agreements with Canada and Yukon, VGFN Citizens ratified and adopted the *Constitution* as their first written supreme law, "desiring to exercise our inherent right of self-government."[45] The *Constitution* represents "the incredible accomplishment of replacing the *Indian Act* with the VGFN Constitution created and amended by the Vuntut Gwitchin at their General Assembly."[46] VGFN's legal order and land-based governance system pre-date colonization in the North and the creation of the Canadian state. These provided for the selection of leaders and find their contemporary expression in the SGA and within the *Constitution*. The *Constitution,* adopted and amended by decision of the Citizens, is VGFN's "North Star" in their exercise of self-determination.[47]

25. Chapter 24 of the Final Agreement and 10.0 of the SGA provided for the scope of the *Constitution*, including exclusive and mandatory powers respecting: (a) VGFN citizenship; (b) establishment of governing bodies, their powers, duties, composition, membership and procedures; (c) recognition and protection of the rights and freedoms of Citizens; (d) means to challenge the validity of laws enacted by VGFN and to quash invalid VGFN laws; and (e) amendment of the *Constitution* by the Citizens.[48] This confirmed the authority of VGFN to set election procedures for the selection of their leaders and to protect the rights and freedoms of Citizens under contemporary VGFN self-government.[49]

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[42] *Federal Act*; *First Nations (Yukon) Self-Government Act*, O.I.C. 1995/001 (1995), later replaced by *First Nations (Yukon) Self-Government Act*, R.S.Y. 2002, c 90 [***Territorial Act***]; *Teslin Tlingit Council v Canada (Attorney General)*, 2019 YKSC 3, paras 13, 16; YKSC Reasons, paras 77, 81.
[43] YKSC Reasons, para 77; *Federal Act*, ss 8(1), 9(1).
[44] *Federal Act*, ss 6(1), 7; YKSC Reasons, para 78.
[45] *Constitution*, Preamble, AR Vol. VIII, Tab 5.13 at 132.
[46] YKSC Reasons, para 152.
[47] YKSC Reasons, paras 12, 44; Tizya-Tramm, para 15, AR Vol. VI, Tab 5.10 at 138.
[48] SGA, s 10.0, AR Vol. V, Tab 5.8 at 83; *Federal Act*, s 9(1).
[49] Final Agreement, ss 24.2.1.1, 24.5.0, AR Vol. V, Tab 5.8 at 2, 4.

26. The *Constitution* provides that it is the "supreme law" of VGFN subject only to the SGA and the rights and freedoms guaranteed to all Citizens under the *Constitution*. It defines the fundamental self-government objectives of VGFN as including, *inter alia,* to: (a) exercise authority in respect of VGFN communities and lands; (b) promote and enhance the general welfare of VGFN; (c) promote, enhance and protect the history, culture, values, traditions and rights of VGFN; (d) promote respect for the ancestral homeland of the Vuntut Gwitchin including its natural resources; and (e) advance the welfare and good government of VGFN.[50]

27. The *Constitution* includes a comprehensive system of self-determined VGFN structures and processes that provide for: institutional sharing of responsibilities between governing bodies, the rule of VGFN law, constitutionalism, democracy, and the protection of the rights and freedoms of Citizens within a free, democratic and self-governing Vuntut Gwitchin society.[51] The governing bodies under the *Constitution* are: (a) Council, consisting of one Chief and four Councillors elected by the Citizens under VGFN law; (b) General Assembly, consisting of all Citizens (or "**GA**"); (c) Elders Council, consisting of all Citizens aged 60 years or older; and (d) Vuntut Gwitchin Court, to be established in the future for the administration of VGFN laws.[52] The duties and powers of Council are stated in the *Constitution*, and include doing such things necessary to further the objects of the *Constitution*. These include responsibility for the objectives of protecting and promoting the homeland and the general welfare of Citizens.[53]

28. VGFN's governing bodies are subject to the core requirement under the *Constitution* that the seat of government be located within Settlement Land.[54] This fulfills the mutual intentions of the parties to maintain VGFN's traditional decision-making structures; support and promote VGFN's contemporary and evolving political institutions and processes; and protect the Vuntut Gwitchin way of life based on their spiritual and economic relationship with the Traditional Territory.[55] The seat of government requirement was adopted by the GA upon the advice of VGFN's Elders. They emphasized the importance of restoring VGFN's legal order and land-based

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[50] *Constitution*, Article I, AR Vol. VIII, Tab 5.13 at 134.
[51] *Constitution*, Articles IV, V, VI, VII, VIII, XIII, XV, XVI, XVIII, XXI, AR Vol. VIII, Tab 5.13 at 136-147; YKCA Reasons, para 136, 157; YKSC Reasons, paras 61-68.
[52] *Constitution,* Articles V, VI, VII, VIII, XV, AR Vol. VIII, Tab 5.13 at 138-140, 145.
[53] *Constitution*, Preamble and Article IX, AR Vol. VIII, Tab 5.13, at 133, 141.
[54] *Constitution*, Article II, s 2, AR Vol. VIII, Tab 5.13 at 135.
[55] SGA*,* Preamble, AR Vol. V, Tab 5.8 at 67-68; Josie #1, para 5, AR Vol. VI, Tab 5.11 at 159.

governance system to address the history and legacy of colonization experienced by VGFN, including the alienation and dispossession of Citizens from the Traditional Territory.[56]

29. The *Constitution* recognizes and protects the individual rights and freedoms of Citizens in relation to exercises of self-government authority by VGFN's governing bodies, including the "right to the equal protection and benefit of VGFN law without discrimination" subject only to "such reasonable limits as can be demonstrably justified in a free and democratic Vuntut Gwitchin society".[57] Until the Vuntut Gwitchin Court is established, the *Constitution* provides that any Citizen may challenge the validity of a VGFN law before the Supreme Court of Yukon and that VGFN laws inconsistent with the *Constitution* may be quashed.

(a) The Residency Requirement

30. Article XI, s. 2 of the *Constitution* sets out that any Citizen elected to Council has the responsibility, in fulfilling their duties and exercising their powers, to reside at the location of the seat of government, within Settlement Land, at the heart of the Traditional Territory:

> If an eligible candidate for Chief or Councillor does not reside on Settlement Land during the election and wins their desired seat they must relocate to Settlement Land within 14 days after election day.[58]

31. Citizens at the GA, in fulfilment of their authoritative constitutional role as VGFN's deliberative body and keepers of the *Constitution*, decided by consensus in 2019 to adopt this Residency Requirement in its current form. A prior version of the Residency Requirement, enacted by GA amendment to the *Constitution* in 2006, had required that a Citizen be resident on Settlement Land in order to be eligible for nomination as a candidate for Council. The 2019 amendment followed an extensive internal VGFN process of advance study, consultation with Citizens, and review by a committee of Citizens.[59] While still seeking to uphold VGFN's fundamental self-government objectives and special relationship to the Traditional Territory, the independent review committee recommended to the GA that the 2006 version of the Residency Requirement be amended in order to increase opportunities for non-resident Citizens to be able to

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[56] Bruce, para 8, AR Vol. VI, Tab 5.9 at 112-113; Tizya-Tramm, paras 12-18, 22-23, AR Vol. VI, Tab 5.10 at 137-140; *R v Ipeelee*, 2012 SCC 13, para 60.
[57] *Constitution,* Article IV ss 1, 7, AR Vol. VIII, Tab 5.13 at 136.
[58] *Constitution*, Article II s 5 and Article IV s 19, AR Vol. VIII, Tab 5.13 at 135, 138.
[59] Ms. Dickson was a member of the committee prior to seeking nomination: Josie #1, para 14, AR Vol. VI, Tab 5.11 at 161.

hold office and "to strike a balance between maintaining the core principle that the seat of government will be on VGFN lands, and the value of having as many VGFN Citizens as possible be eligible for election to the Council."[60]

32. The enactment and evolution of the Residency Requirement reflects the continuation and adaptation of VGFN's distinct legal and land-based governance traditions for the selection of Dinjii Kat Chih Ahaa, which have been practiced since time immemorial.[61] Prior to the imposition of the *Indian Act* by Canada, Citizens selected their leaders by consensus decision of the community. Successful leaders would demonstrate their skills, knowledge and abilities in relation to the Traditional Territory and their ability to provide service for the general welfare of the community.[62] The persistence of Vuntut Gwitchin laws and governance practices with respect to selection of Dinjii Kat Chih Ahaa is demonstrated by the fact that, up to the present day, every VGFN leader selected by Citizens has resided on the Traditional Territory.[63] The Residency Requirement is a manifestation of the deep and enduring connection between VGFN self-government, leadership and the land.[64] This connection is of urgent concern for VGFN, who face a disproportionately high risk from climate change, which threatens their traditional ways of life.[65]

D. Procedural History

33. The Appellant applied to the Supreme Court of Yukon ("**YKSC**") for a declaration pursuant to s. 52 of the *Constitution Act, 1982*, that the Residency Requirement is inconsistent with s. 15(1) of the *Charter* and should be struck; and alternatively sought relief on the basis that the provision is inconsistent with Article IV(7) of the *Constitution*.[66]

34. The YKSC concluded that the Residency Requirement is "based upon hundreds of years of leadership by those who reside on the land", reflects a continuous and evolving practice of VGFN "since time immemorial to the present day", and represents their collective decision to

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[60] Josie #2, paras 9, 11 and 18, AR Vol. VIII, Tab 5.14 at 157, 159-160.
[61] YKSC Reasons, para 207; Josie #2, Exhibit A, AR Vol. IX, Tab 5.14 at 9.
[62] Bruce, para 7, AR Vol. VI, Tab 5.9 at 113; YKSC Reasons, para 7; YKCA Reasons, para 147.
[63] Tizya-Tramm, para 16, AR Vol. VI, Tab 5.10 at 138; YKSC Reasons, para 44.
[64] YKSC Reasons, paras 207, 210-211; Tizya-Tramm, paras 12-18, AR Vol. VI, Tab 5.10 at 137-138; Bruce, paras 7-9, AR Vol. VI, Tab 5.9 at 113-114; Josie #2, paras 6-15, Exhibit A, AR Vol. VIII, Tab 5.14 at 156-159 and Vol. IX, Tab 5.14 at 136.
[65] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, para 11.
[66] Amended Petition, paras 1(a-b) and 61(a-b), AR Vol. II, Tab 4.1 at 13.

retain a traditional practice that would have been unthinkable to breach in the past as a collective response to the erosion of Vuntut Gwitchin land, culture and community.[67] The YKSC held that the *Charter* applies broadly to the VGFN government, *Constitution* and laws including the Residency Requirement.[68] The Court further concluded that while the Residency Requirement in general is not inconsistent with s. 15 of the *Charter*, its 14-day limit was an unjustified "potentially arbitrary disenfranchisement."[69] The YKSC determined that s. 25 of the *Charter* operated to shield the Residency Requirement with the exception of the 14-day provision.[70]

35. The Court of Appeal of Yukon ("**YKCA**") allowed both the appeal by Ms. Dickson and cross-appeal by VGFN, and in the result upheld the Residency Requirement in its entirety.[71] The YKCA held, without determining the source of the authority exercised by VGFN,[72] that the *Charter* applies to the Residency Requirement, but confirmed this holding was in relation to that provision narrowly and not VGFN government, *Constitution* and laws more generally.[73] The YKCA held that the Residency Requirement infringes the Appellant's rights under s. 15(1), subject to possible justification under s. 1.[74] The YKCA further held that the application of s. 15(1) would "derogate from VGFN's rights to govern themselves in accordance with their own particular values and traditions" and in accordance with the Agreements.[75] The YKCA ultimately concluded that s. 25 is "better characterized as a 'shield' than a 'lens' or interpretive aid that would 'read down' or 'modify' rights in the event of a conflict" and that it fully shields the entire Residency Requirement including the 14-day provision.[76]

PART II - POINTS IN ISSUE

36. This appeal and cross-appeal raise the following issues, each of which may dispose of the Appellant's claim:

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[67] YKSC Reasons, paras 207-208, 211.
[68] YKSC Reasons, paras 130-131.
[69] YKSC Reasons, para 165.
[70] YKSC Reasons, para 212.
[71] Frankel JA concurred but would not have included any declarations within the order: YKCA Reasons, paras 188-189.
[72] YKCA Reasons, para 91.
[73] YKCA Reasons, paras 83-99, 162.
[74] YKCA Reasons, paras 107-117, 162.
[75] YKCA Reasons, para 149.
[76] YKCA Reasons, paras 143-146, 158, 162.

(a) Whether the *Charter* applies to the Residency Requirement;

(b) Whether the Residency Requirement is shielded by s. 25 of the *Charter*; and

(c) Whether the Residency Requirement is inconsistent with s. 15(1), and if so whether it is a reasonable limit pursuant to s. 1.

PART III - LEGAL ARGUMENT

37. The Courts below correctly concluded that the Appellant's claim must be dismissed because s. 25 shields the Residency Requirement. However, the Court ought to have also held that the *Charter* does not apply and that the Appellant's claim under s. 15(1) of the *Charter* must fail.

A. The *Charter* does not apply to the Residency Requirement

38. VGFN submits that the *Charter* does not apply and that this is a full answer to the Appellant's claim under s. 15(1). The *Charter* could only apply to aspects of VGFN's inherent right of self-government if VGFN were carrying out delegated authority of Parliament or a legislature or if the parties had consented to its application in the Agreements. Neither condition is met.

39. Finding that the *Charter* is not applicable to the Residency Requirement does not result in a Vuntut Gwitchin society devoid of law, democracy or protection for the rights and freedoms of Citizens. The result is what was contemplated in the process of reconciliation embarked on by VGFN and the Crown: an Indigenous people exercising self-government and protecting the rights and freedoms of their Citizens in a manner consistent with their right to self-determination. This case does not justify expanding the application of the *Charter* beyond its textual, purposive and principled limits, confounding rather than resolving constitutional questions.

1. The *Charter* does not apply to the Residency Requirement by way of s. 32

40. A principled, contextual and purposive approach to interpreting s. 32 in the context of VGFN's self-government does not apply the *Charter* to the Residency Requirement.[77]

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[77] *Hunter v Southam Inc*, [1984] 2 SCR 145 [***Hunter***]; *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 [***Big M***] at 344.

(a) The Residency Requirement is an exercise of inherent self-government

41. The *Charter* regulates and limits Canadian state authority in relation to individuals. Section 32 means that the central question about *Charter* application is: what is the nature and source of the authority whose exercise is complained of?[78] In this case, the Courts below did not precisely address the nature and source of the authority pursuant to which the Residency Requirement was imposed, viewing the question as potentially "futile."[79] As a result, the Courts below erred and extended the reach of s. 32 beyond its logical or legal bounds.

42. The facts in this case support the finding of the YKSC that the Residency Requirement is an exercise of VGFN's inherent right to self-government that is based on their pre-existing legal and governance traditions.[80] The YKSC properly found this to be a sufficient basis to determine that the source of VGFN's self-government powers underlying the Residency Requirement is inherent to Vuntut Gwitchin and exists independently of Crown sources, and that its "validation" by the Agreements does not alter the source of VGFN's authority.[81] This conclusion by the YKSC is owed deference.[82]

(b) The text and legislative context of s. 32

43. The plain meaning of the text is paramount in *Charter* interpretation.[83] The drafters of the *Constitution Act, 1982* chose the precise words of s. 32 of the *Charter* to refer to Canada's Parliament, the provincial and territorial legislatures, and their governments. The text of s. 32 does not capture the authority of Indigenous peoples exercising inherent rights to self-government; it refers to the authority of the governments under ss. 91 and 92 of the *Constitution Act, 1867*:

> This Charter applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

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[78] *Greater Vancouver Transportation Authority v Canadian Federation of Students - British Columbia Component*, 2009 SCC 31 [***GVTA***], paras 13-16.
[79] YKCA Reasons, para 93.
[80] YKSC Reasons, paras 145, 207.
[81] YKSC Reasons, paras 131, 145, 206.
[82] *R v Desautel*, 2021 SCC 17 [***Desautel***], para 55; *Mitchell v MNR*, 2001 SCC 33 [***Mitchell v MNR***], para 36.
[83] *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32, paras 8-12.

> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.[84]

44. The legislative architecture of the *Constitution Act, 1982* does not contemplate the application of the *Charter* to an Indigenous governing body exercising self-government. Section 32, defining the reach of the *Charter* to Parliament and legislatures, was enacted simultaneously with the inclusion of s. 35 in the *Constitution Act, 1982* (outside the *Charter*) as a comprehensive provision for constitutional recognition and protection of the rights of Indigenous peoples. This placement was coherent with the inclusion of s. 25 in the *Charter,* which confirmed that an application of the *Charter* shall not abrogate or derogate from protected Indigenous rights.

45. Despite the hard-fought gains of Indigenous peoples to have their unique place recognized and protected in the constitutional repatriation and amendment process in the 1970s and 80s through the inclusion of both ss. 35 and 25, there remained a significant constitutional 'gap' with respect to Indigenous self-government at the time the *Constitution Act, 1982* came into force.[85] This was in part addressed by the interim measures of s. 37 and later s. 37.1 of the *Constitution Act, 1982,* which mandated constitutional conferences to address "matters that directly affect aboriginal peoples of Canada including the identification and definition of the rights of those peoples to be included in the Constitution of Canada."[86]

46. The relationship between Indigenous self-government and the Constitution of Canada, including the application of the *Charter,* emerged as the primary focus of the constitutional conferences.[87] None of the conferences, including that which led to the defeated Charlottetown

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[84] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [***Charter***], s 32(1).
[85] Hawkes, David C., Negotiating Aboriginal Self-Government - Developments Surrounding the 1985 First Ministers' Conference (Institute of Intergovernmental Relations, 1985) [***Hawkes***] at 1, 8; *Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis*, 2022 QCCA 185 [***FN Youth Reference***], paras 389-390.
[86] *Constitution Act*, ss 37, 37.1, repealed by Section 54 and Section 54.1 of the *Constitution Act, 1982* on April 17, 1983 (repealed text at footnotes 100 and 101 of the *Act*); Hogg, Peter W., *Constitutional Law of Canada*, 5th ed, Vol 1 (Toronto: Carswell, 2007) (loose-leaf updated 2019, release 1) [**Hogg**] at §28:42.
[87] *Hawkes* at 1, 8; *FN Youth Reference*, para 391.

Accord in 1992, resulted in an amendment that would extend the reach of s. 32 to Indigenous self-government, throwing the issue "back into the legal and political arenas."[88]

(c) Delegated authority subject to the* Charter *requires a direct connection

47. The application of the *Charter* may be extended beyond the plain words of s. 32 where an entity is an agent of, under the control of, an apparatus of, or carrying out the law or policies of the Parliament or legislatures.[89] The rationale for this extension is to prevent Parliament or legislatures from circumventing the *Charter* through the delegation or transfer of their powers.[90] The application of the *Charter* to entities that are not Parliament, legislature or their governments must be assessed on the facts of each case.[91] There is no legal principle allowing default application or expansion of the *Charter* beyond situations of clear governmental control or delegation.

48. With respect, the Courts below erred in interpreting this Court's statements in *Eldridge* to support the conclusion that VGFN, in particular the GA, "by its very nature" was exercising "governmental" powers within the meaning of s. 32. This Court in *Eldridge* found that merely performing a "public function" is insufficient to bring an entity within the ambit of "government" for the purposes of s. 32.[92] The basis for finding that the *Charter* applied to a hospital was that the medical services in issue were provided under the province's *Hospital Insurance Act,* and were structured by that legislation with a "direct and… precisely defined connection" between a specific government policy and the hospital's impugned conduct that attracted the *Charter*.[93] *Eldridge* indicates that to be "governmental" for the purposes of s. 32, an entity must be tethered to the authority of Parliament or a legislature through a specific statutory scheme, government program or objective *of* the Parliament or a legislature.

49. Entities other than the Parliament, legislatures and their governments can be subject to the *Charter,* but only when they are "entities that are controlled by government or that perform truly

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[88] Canada, *Consensus Report on the Constitution: Charlottetown* (Final Text), (Ottawa: no publisher, 1992), s 43; *FN Youth Reference*, para 392; McNeil, Kent, "Aboriginal Governments and the Canadian Charter of Rights and Freedoms" (1996) 34:1 Osgoode Hall LJ 61-99 at 62; Hogg at §28:43.
[89] *GVTA*, paras 13-16; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 [***Eldridge***] at paras 41, 52; *Godbout v Longueuil (City)*, [1997] 3 SCR 844 [***Godbout***], para 48.
[90] *Eldridge,* para 42.
[91] *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573, para 34.
[92] *Eldridge,* para 43.
[93] *Eldridge,* paras 49-51.

governmental functions" contemplated by s. 32, being "themselves 'matters within the authority' of the particular legislative body that created them." Courts have concluded that the *Charter* applies to municipalities, hospitals, and transit authorities; they have found that it does not apply to universities, in decisions that emphasized the importance of universities' autonomy from government, necessary to support academic freedom.[94] An extension of *Charter* application to an entity whose legal authority exists outside the authority of Parliament and legislatures under ss. 91 and 92 of the *Constitution Act, 1867* stretches the text of s. 32 beyond its limit.

50. Unlike in *Eldridge*, Citizens meeting together on the Traditional Territory and making decisions about selection of leaders as their ancestors did before them are not exercising delegated authority. As the YKSC correctly found: "it is not the federal government that imposes the residency requirement in the *Indian Act*, but the VGFN citizens present and voting at the GA, exercising their inherent right of self government."[95] This finding is consistent with a growing body of Canadian law recognizing the *sui generis* nature of Indigenous self-government rights, owing to their unique, inherent source predating the Canadian state.[96] Indeed, the common law has expressed unequivocal support for the principle that Indigenous self-government authority is not conferred by legislation, but is based on the prior sovereignty, occupation and control of Indigenous peoples.[97] In particular, the selection of leaders and the structure and functioning of governing bodies have been found to be "manifestly" an exercise of an inherent right to self-government based on the prior existence of autonomous Indigenous peoples.[98]

51. The passage of the *Federal and Territorial Acts* did not amount to a delegation or devolution of federal or territorial authority to VGFN. These acts must be interpreted purposively: they do not, and could not, confer or create VGFN self-government authority; they confirm certain

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[94] *Godbout*, para 51; *GVTA*, para 24; *McKinney v University of Guelph,* [1990] 3 SCR 229 [***McKinney***] at 268, 273-275.
[95] YKSC Reasons, para 145.
[96] *R v Van der Peet*, [1996] 2 SCR 507 [***Van der Peet***] at paras 30-31; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 [***Tsilhqot'in***], paras 141-144; Macklem, Patrick, "The Constitutional Identity of Indigenous Peoples in Canada: Status Groups or Federal Actors?" (2017) at 14-15.
[97] *FN Youth Reference*, para 425, citing *Mitchell v MNR*, paras 130, 134-135, Binnie J. concurring.
[98] *Campbell v British Columbia (AG)*, 2000 BCSC 1123 [***Campbell***], para 103; *Pastion v Dene Tha' First Nation*, 2018 FC 648 [***Pastion***], para 12.

pre-existing self-government powers based upon the fact of prior sovereignty, and create a space for their practical and contemporary exercise through legal recognition by Canada and Yukon.[99] As noted in *Eldridge*, a statutory provision on its own is insufficient to make the *Charter* apply where otherwise it would not.[100] Private corporations, for example, are creations of statute, yet are not subject to the *Charter*.

2. The *Charter* does not apply pursuant to the Agreements

52. The Crown and Indigenous rights-holders may agree to terms for the application of the *Charter* to aspects of inherent self-government rights through a treaty or other arrangement. There was no such agreement here. With respect, the Courts below erred by defaulting to the application of the *Charter* rather than striving for an interpretation of the Agreements that better reflected the common intention of all parties.[101]

53. The Agreements between VGFN and the Crown represent a monumental achievement. Their carefully negotiated terms set out a path to self-determination and reconciliation for VGFN with the Crown and broader Canadian society. The interpretation of the Courts below leaves VGFN without the continuity, transparency, and predictability they bargained for. Instead, it imposes new constitutional limitations, in perpetuity, on VGFN's collective right to continue to live together as Vuntut Gwitchin on their own lands and under their own laws. This interpretation risks the erosion of VGFN's ongoing process of reconciliation with the Crown. It disregards the Agreements' objective: to implement self-government based on mutual consent and respect for VGFN's prior sovereignty.

(a) Interpreting modern treaties and self-government agreements

54. This Court's canon of treaty interpretation principles holds that, above all, treaties are sacred covenants with solemn promises that create enforceable obligations based on mutual consent.[102] The objective of interpreting all treaties between Indigenous peoples and the Crown –

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[99] Wilkins, Kerry, "…But We Need the Eggs: The Royal Commission, the Charter of Rights and the Inherent Right of Aboriginal Self-Government" (1999) 49:1 UTLJ 53 at 74 [**Wilkins**].
[100] *Eldridge*, para 35; *McKinney* at 268; Wilkins, 75.
[101] Metallic, Naiomi, "Checking our Attachment to the Charter and Respecting Indigenous Legal Orders: A Framework for Charter Application to Indigenous Governments" (2022) 31:2 Constitutional Forum 3 [**Metallic**] at 4-5.
[102] *R v Badger*, [1996] 1 SCR 771 [***Badger***], para 41; *Beckman,* paras 8-12, 62; *Nacho Nyäk Dun*, paras 7-10, 33-38.

whether "historic" or "modern" – is to ascertain, by the text and objectives of the treaty as a whole, the common intention of the parties at the time the treaty was signed.[103]

55. Treaty interpretation requires paying close attention to the terms, "interpreting the provision at issue in light of the treaty text as a whole and the treaty's objectives," generously and in light of the nature of the agreement.[104] Treaties should not be altered in their interpretation by exceeding what is realistic or possible on the words. Ignoring the terms to which the parties have agreed "is to render the treaty meaningless."[105]

56. Modern treaties must "be considered with great respect" and given deference. They are detailed and sophisticated constitutional documents, meticulously negotiated over long periods by adequately resourced and professionally represented parties with the intention to increase certainty and transparency around property and governance rights and to advance reconciliation by placing "Aboriginal and non-Aboriginal relations in the mainstream legal system."[106]

57. The Indigenous perspective must be given effect in treaty interpretation, particularly where ambiguity or doubtful expressions may exist in the text.[107] Indigenous perspectives must be given equal weight to common law perspectives, with evidence of those perspectives received on an equal footing with other forms of evidence.[108] The Indigenous perspective, which focuses on the laws, practices, customs and traditions of the group, assists a court to choose from among the various possible interpretations of common intention the one which best reconciles the interests of both parties at the time the treaty was signed.[109]

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[103] *R v Sioui*, [1990] 1 SCR 1025 [***Sioui***] at 1068-1069.
[104] *Nowegijick v The Queen*, [1983] 1 SCR 29 [***Nowegijick***] at 36; *Nacho Nyäk Dun,* para 37; *Quebec (Attorney General) v Moses*, 2010 SCC 17*,* para 7; *Beckman,* para 10; Final Agreement, ss 2.6.1, 2.6.6 and 2.6.7, AR Vol. III, Tab 5.8 at 98, 100; *Interpretation Act*, RSC 1985, c I-2, s 12.
[105] *Beckman,* para 54; *Nacho Nyäk Dun,* para 36; *Badger,* para 52; *Newfoundland and Labrador v Nunatsiavut Government*, 2022 NLCA 19, para 77.
[106] *Desautel*, para 82; *Nacho Nyäk Dun,* para 36; *Beckman*, para 12.
[107] *Nowegijick* at 36; *Desautel,* para 45.
[108] *Tsilhqot'in*, para 14, 32, 41; *Mitchell v MNR*, para 39; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [***Delgamuukw***], para 147; *Van der Peet*, para 42; *R v Sparrow*, [1990] 1 SCR 1075 [***Sparrow***] at 1107.
[109] *Badger,* paras 52-54; *Simon v The Queen*, [1985] 2 SCR 387*,* para 27; *Nowegijick* at 36; *Sparrow* at 1112; *Tsilhqot'in*, paras 35, 49, 54, *Delgamuukw*, paras 148-149.

58. Treaties must also be interpreted in a manner that furthers rather than frustrates the purposes of s. 35, which looks to foster a positive long-term relationship based upon good faith, honour, mutual consent and equal partnership.[110] Section 35 signaled a paradigm shift toward a "just settlement for aboriginal peoples" and a "commitment by Canada's political leaders to protect and preserve constitutional space for Aboriginal peoples to be Aboriginal."[111] The purposes of s. 35 include the recognition of the prior occupation of Canada by organized, autonomous societies and the reconciliation of their modern-day existence with the Crown's assertion of sovereignty.[112] Reconciliation is served by the honourable negotiation of treaties, including modern treaties.[113] Treaty interpretation must uphold the constitutional principle of the honour of the Crown, which acknowledges the special relationship that arose out of the colonial practice of superimposing European laws on Indigenous peoples' pre-existing legal orders and self-governing authority.[114]

59. Modern treaties and the treaty rights they protect should be given meaning within Canadian law in a manner consistent with Canada's international legal obligations, including upholding the fundamental right of Indigenous peoples to self-determination.[115]

60. VGFN further submits that the principles for interpreting modern treaties are applicable to understanding the terms of non-treaty agreements such as the SGA. These contain the same modern sophistication and detail, are based upon mutual consent, give rise to enforceable obligations with legal, constitutional and international significance, and which address aspects of

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[110] *Beckman*, para 10; *Delgamuukw*, para 186; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 [***Haida***], paras 14 & 25; *Tsilhqot'in*, paras 17-18; *Desautel*, paras 87-92.
[111] *Sparrow* at 1105-1106; *Beckman*, para 33.
[112] *Desautel*, para 22; *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 [***NFL SCC***], para 207; *Delgamuukw,* para 186; *Van der Peet*, paras 31, 36 and 43.
[113] *Haida,* para 20; *Beckman*, para 10.
[114] *Beckman*, paras 12 and 54; *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 [***Manitoba Metis***], para 67; See Gunn, Kate, "Towards a Renewed Relationship: Modern Treaties & the Recognition of Indigenous Law-Making Authority" (2022) 31:2 Constitutional Forum 17 at 19-21.
[115] *R v Hape*, [2007] 2 SCR 292 [***Hape***] at paras 35-39, 53-56. See also van Ert, Gib, "International law and aboriginal peoples" in *Using International Law in Canadian Courts*, 2nd ed (Toronto: Irwin Law, 2008) at 311-322; United Nations Declaration on the Rights of Indigenous Peoples, GA RES 295 (CVII), UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295 (2007) [***UNDRIP***].

the *sui generis* Indigenous-Crown relationship. Such arrangements must also be interpreted in a manner consistent with the "national commitment" to reconciliation.[116]

61. Where arrangements or legislation are specifically intended to recognize and implement aspects of Indigenous peoples' inherent rights to self-government, courts have consistently recognized the principle of deference to Indigenous self-government and the autonomy of Indigenous peoples over their internal affairs. This includes taking the least intrusive approach and avoiding interpretations that restrict the ability of Indigenous peoples to be self-governing in accordance with their systems of law and internal decision-making procedures.[117] This approach is consistent with the authoritative role of the courts in vindicating aboriginal and treaty rights through the interpretation of ss. 25 and 35, while also respecting that, "[i]t is for Aboriginal peoples, however, to define themselves and to choose by what means to make their decisions, according to their own laws, customs and practices."[118]

(b) VGFN did not consent to the application of the Charter

62. The Courts below gave little or no weight to the evidence of the Vuntut Gwitchin perspective and narrowly considered specific terms in isolation from the text and objectives of the Agreements as a whole. This decontextualized approach was in error. It ascribed a meaning to the solemn promises exchanged in the Agreements that directly conflicts with the evidence regarding the Vuntut Gwitchin perspective at the time the Agreements were signed.

63. The text and objectives of the Agreements as a whole and the uncontradicted evidence demonstrate that: (a) VGFN did not consent to the application of the *Charter*, and (b) that the parties intended for VGFN to be self-governing over their own lands and internal affairs, including the selection of their leaders, pursuant to their *Constitution* and laws.[119]

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[116] *R v Marshall*, [1999] 3 SCR 533, para 45; *Desautel*, para 85; YKCA Reasons, para 93.
[117] *Sioui* at 1055; *Pastion*, paras 2-26; *Edzerza v Kwanlin Dun First Nation*, 2008 YKCA 8 [***Edzerza***], para 26; *Harpe v Massie and the Ta'an Kwäch'än Council*, 2005 YKSC 54 [***Harpe***], paras 34-37.
[118] *Desautel*, paras 84-86.
[119] Joe, paras 5, and 9, AR Vol. VII, Tab 5.12 at 2-3; Final Agreement, Preamble and ss 9.1.1, 9.5.7, 24.1.0, 24.2.0 and 24.5.0, AR Vol. III, Tab 5.8 at 64-65, 167, 169, and AR Vol. V, Tab 5.8 at 1, 2, 4; SGA, Preamble and ss 2.0, 9.0, 10.0, 11.0, 13.0, 13.5.0, 13.6.0, 14.0, 20.1 and Schedule A, AR Vol. V, Tab 5.8 at 67-68, 75, 82, 83, 83-84, 86, 91-93, 93-95, 95-97, 107, 110-114.

64. The Agreements do not refer to the *Charter* or its application. The evidence shows that VGFN refused to agree, on principled bases, to application of the *Charter*.[120] Nothing in the text of the Agreements contradicts the Vuntut Gwitchin perspective that they did not consent to the application of the *Charter.* The Courts below nevertheless concluded, based on an extrapolation from various features negotiated under the Agreements, that the *Charter* applied.[121] These features include: (1) acknowledgement that the self-government powers that the parties agreed to negotiate were understood to be "in conformity with the Constitution of Canada"; (2) that "all laws of General Application" as defined by the common law continue to apply to VGFN, their Citizens and Settlement Land subject to the terms of the SGA; and (3) the achievement of the SGA did not affect the rights, services, benefits and protections Citizens are entitled to or eligible for under Canadian law "as Canadian citizens."

65. VGFN submits that a faithful reading of the provisions reveals that the features of the Agreements relied on to apply the *Charter* do not in fact call for its application in this case. Defaulting to *Charter* application was in error.

(i) "in conformity with the Constitution of Canada"

66. The Courts below placed significant emphasis on 24.1.2 of the Final Agreement, which says "Subject to negotiation of an agreement pursuant to 24.1.1 and in conformity with the Constitution of Canada, the powers of a Yukon First Nation may include …". However, the words "in conformity with the Constitution of Canada" in this provision do not mean the *Charter* applies to VGFN's exercise of their inherent right to self-government. Read in their context, the words instead refer to limitations on Canada's own constitutional authority in negotiating self-government with Indigenous peoples.

67. The direct evidence of VGFN's chief negotiator Dave Joe is that the language of "conformity with the Constitution", was understood by VGFN to mean that the negotiation of the SGA pursuant to Chapter 24 would not (and could not) exceed Canada's and Yukon's own constitutional limitations.[122] The parties understood that self-government would not alter the division of powers in the *Constitution Act, 1867*, and would conform with s. 35 of the *Constitution*

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[120] Joe, paras 5 and 9, AR Vol. VII, Tab 5.12 at 2-3.
[121] YKSC Reasons, para 110; YKCA Reasons, paras 95-97; Final Agreement, ss 24.1.2, 24.1.3, AR Vol. V, Tab 5.8 at 1; SGA, ss 3.6, 3.6.1, 3.6.2, 13.5.1, AR Vol. V, Tab 5.8 at 76, 91.
[122] Joe, para 7, AR Vol. VII, Tab 5.12 at 2-3.

Act, 1982. This understanding is compatible with s. 32 which affirms that the *Charter* will in all circumstances apply to Canada and the Yukon, and s. 25 which affirms that the *Charter* cannot be applied in a way that abrogates or derogates from an aboriginal, treaty or other right or freedom.

68. By contrast, the interpretation of "conformity with the Constitution of Canada" adopted by the Courts below conflicts with the clear terms in the Agreements that the *Constitution* will contain its own provisions for the protection of individual rights and freedoms of Citizens, including a process for enforcement. On the evidence, an interpretation of the text of 24.12.2 as applying the *Charter* to an exercise of VGFN's inherent right to self-government is inconsistent with the Vuntut Gwitchin perspective.

69. The constitutional provisions in issue in this case must be interpreted purposively and in their legislative context. It is incoherent with the Constitution of Canada as a whole to force s. 35 rights holders exercising their pre-existing inherent self-government powers into the place of s. 91 and 92 governments and in doing so capture them under s. 32. If the parties intended to impose the *Charter* as a constraint on VGFN's self-government rights and freedoms, the honour of the Crown would require such a consequential term to be express, unambiguous, and mutually consented to in the Agreements, not inferred after the fact. Recognition of this principle is evident in other modern land claim agreements negotiated and entered into by Canada that expressly state the *Charter* applies to an Indigenous governing body and its powers.[123]

(ii) Laws of General Application

70. VGFN submits that the *Charter* is expressly not a law of "General Application" within the meaning of 13.5.1 of the SGA. The personal rights and freedoms guaranteed in the *Charter* are for the benefit of all Canadians. However, the application of the *Charter* is limited, not general: the governments and law-making bodies to which the *Charter* applies are those that derive their authority from ss. 91 and 92 of the *Constitution Act, 1867,* as laid out in s. 32.

(iii) Protections available to Canadian citizens

71. In removing VGFN from under the *Indian Act*, the Agreements confirm they do not affect the rights, services, benefits and protections that all Citizens are entitled to or eligible for under

[123] *Nisga'a Final Agreement Act,* SBC 1999, c 2, Schedule Ch 2, s 9; *Tla'amin Final Agreement Act*, SBC 2013, c 2, Schedule Ch 2, s 8.

Canadian law "as Canadian citizens".[124] This term of the Final Agreement should not be interpreted in a way that fundamentally alters the Canadian constitutional landscape by applying the *Charter* to aspects of VGFN's inherent right to self-government. Rather, the provision is a guarantee that Citizens who are also Canadian citizens have the same *Charter* guarantees as other Canadian citizens, against federal and provincial or territorial governments. In addition, all VGFN Citizens enjoy the rights and freedoms protected under the *Constitution* in relation to VGFN's self-governing bodies and their laws.

72. This interpretation best reconciles the interests of the parties at the time the Agreements were signed as it is consistent with their texts and objectives as a whole, takes into account the Vuntut Gwitchin perspective, and furthers rather than frustrates the purposes of s. 35. It does not follow from the text of 24.1.3 of the Final Agreement or 3.6 of the SGA that Citizens are entitled to rely on the *Charter* to challenge the decision-making of VGFN's self-governing bodies and the validity of VGFN laws.

(c) The Agreements preserve VGFN self-government rights and freedoms

73. The intention of the parties to the Agreements was to uphold VGFN's right to self-determination, and in particular, the rights of Citizens, collectively and individually, to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the Canadian state.[125]

74. The parties intended for VGFN to be self-governing over their own lands and their internal affairs, including selection of leaders.[126] In light of the evidence respecting the Vuntut Gwitchin perspective at the time the Agreements were signed (following extensive discussions between VGFN and the Crown regarding the *Charter*),[127] it is not a realistic interpretation of the Agreements to conclude that the (unwritten) mutual intention of the parties was to agree to the application of the *Charter* to aspects of VGFN's inherent right to self-government.

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[124] Final Agreement, s 24.1.3, AR Vol. V, Tab 5.8 at 1; SGA, s 3.6, AR Vol. 5, Tab 5.8 at 76.
[125] *UNDRIP*, article 5.
[126] Final Agreement, Preamble and ss 2.6.7, 9.1.1, 9.5.7, 24.1.0, 24.2.0 and 24.5.0, AR Vol. III, Tab 5.8 at 64-65, 100, 167, 169 and AR Vol. V, Tab 5.8 at 1, 2, 4-5; SGA, Preamble and ss 2.0, 8.7, 9.0, 10.0, 11.0, 13.0, 13.5.0, 13.6.0, 14.0, 20.1 and Schedule A, AR Vol. V, Tab 5.8 at 67-68, 75, 80, 82, 83, 83-84, 86-95, 95-97, 107 and 110-114.
[127] YKCA Reasons, para 95; Joe, paras 5-6, 9-12, AR Vol. VII, Tab 5.12 at 2, 3-5.

75. The Vuntut Gwitchin perspective reinforces the significance of the Agreements and *Constitution* as means for promoting VGFN's distinct culture, laws, and relationship to the Traditional Territory in a manner free from incursions on their autonomy. Notwithstanding the attempted erasure of the Vuntut Gwitchin way of life through Crown policies of assimilation, VGFN's pre-existing legal traditions survived, were received into the Canadian common law and continued as aboriginal rights.[128] From both a Vuntut Gwitchin *and* a common law perspective, VGFN's self-government rights have never been extinguished or released, but were intentionally preserved by the parties under the terms of the Agreements.

76. The Agreements were not intended to fully reconcile VGFN's prior sovereignty with the assumed sovereignty of the Crown, particularly with respect to VGFN's assertion of continuing aboriginal rights including self-government.[129] In deliberately excluding the SGA from the Final Agreement and the protection of being a defined treaty right, the mutual interest of the parties at the time the Agreements were signed was to preserve, unaffected, VGFN's ability to assert and exercise its continuing aboriginal and other rights or freedoms within the meaning of ss. 25 and 35, including self-government rights and freedoms. The parties left open the possibility of future negotiations and constitutional discussions in the context of an evolving long-term VGFN-Crown relationship.[130] This deliberate choice of the parties was a direct consequence of the prevailing Crown policy of the day, which was to *deny* the existence of any aboriginal rights, here including VGFN's inherent right to self-government.[131]

3. Constitutional and international legal principles support non-application of the *Charter*.

77. The conclusion urged by VGFN is also consistent with a principled and purposive understanding of the constitutional framework of Canada as a whole, and with Canada's international legal obligations.[132] VGFN's unique constitutional status as an Indigenous people exercising their inherent right of self-government under their own *Constitution* and laws is a

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[128] *Desautel*, para 68; *Mitchell v MNR*, paras 62-64; *Calder et al v Attorney-General of British Columbia*, [1973] SCR 313 **[*Calder*]** at 328, 402.
[129] Final Agreement, s 2.6.4, AR Vol. III, Tab 5.8 at 99.
[130] Final Agreement, ss 2.5.0, 2.5.1.1, 2.6.4, 2.6.5, 24.12.1, 24.12.2, 24.12.3, 24.12.4, AR Vol. III, Tab 5.8 at 97-98, 99 and AR Vol. V, Tab 5.8 at 7, 8.
[131] Final Agreement, s 2.6.4, AR Vol. III, Tab 5.8 at 99.
[132] *Hunter* at 156-157; *R v JJ*, 2022 SCC 28, para 334.

paramount concern in this case, but was given insufficient regard in the Courts below. Courts have developed great expertise in applying the *Charter* and upholding the rights and freedoms that it guarantees. However, the threshold question of whether it applies must be answered before doing so. In this case such an application would operate to the detriment of reconciliation, democracy and the rule of law within an Indigenous legal order older than the *Charter* and Canada itself.

(i) Declining to apply the *Charter* is consistent with s. 35 rights recognition and protection

78. Declining to expand the application of the *Charter* to the Residency Requirement is consistent with the promise of s. 35. An exercise of Indigenous self-government with its source in inherent, pre-colonial power must attract a presumption that it is protected within the scope of s. 35. Subjecting exercises of a self-government right to *Charter* review results in *prima facie* infringement. Provisions of the constitution must be interpreted in a manner that is most harmonious with other constitutional provisions where they are in tension;[133] here, the Courts below instead pitted s. 35 and s. 32 against one another.

79. By applying the *Charter*, the Courts below imposed a significant limit on VGFN's inherent right to self-government, which is an aboriginal right protected under s. 35(1) of the *Constitution Act, 1982*. Courts have articulated the impacts of the unilateral imposition of the *Charter* on Indigenous self-government as a clear restriction on the right,[134] and legal scholars have described its effect as subjugation and assimilation, however well intended.[135] Here the imposition of the *Charter* has the derogating effect of VGFN being "subjected to having its legal order intensely scrutinized by standards foreign to it".[136]

80. This Court has recognized that the application of the *Charter* results in the "negation" or diminution of the power of a governing body and refused to apply the *Charter* to the exercise of parliamentary privilege.[137] This is precisely what is at stake for VGFN. VGFN Citizens through

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[133] *Harvey v New Brunswick (Attorney General)*, [1996] 2 SCR 876, para 69; *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835 at 877.
[134] *FN Youth Reference*, paras 518, 520, 528-529.
[135] Turpel, Mary Ellen, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989-1990) 1989 Can Hum Rts YB 3 at 40-42.
[136] Metallic at 8.
[137] *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 SCR 319 at 364-365.

the GA enacted a law seeking to balance collective and individual rights and freedoms from their distinct legal perspective. Here the imposition of the *Charter* would undermine the ability of VGFN to exercise their inherent right to self-government under their own *Constitution* and laws.[138] At a practical level, subjecting VGFN's governance to *Charter* review is also costly, adversarial, and invites intrusive and uncertain legal challenges that would impact the future trajectory of VGFN's social, cultural, political and economic development.[139]

81. The jurisprudence regarding the application of the *Charter* to foreign states (although distinct from the unique situation of Indigenous peoples in Canada) recognizes that the application of the *Charter* to the governance activities of other sovereigns is fundamentally disrespectful of those states' laws and standards of governance and should be avoided as much as possible.[140] Maintaining an analogous respect for the Residency Requirement would retain the critical space that is required for the maintenance, strengthening, and continued development of Indigenous legal orders in Canada.

82. A principled and purposive approach in this case requires a court to ask whether its interpretation of s. 32 would "risk 'undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers'?"[141] The Courts below did not consider whether the application of the *Charter* had the potential to impair VGFN's inherent right to self-government, and accordingly erred in their application of s. 32, by creating tension and disharmony between separate provisions of the *Constitution Act, 1982*.

(ii) Declining to impose the *Charter* is consistent with the principle of reconciliation

83. Concluding that the *Charter* does not supplant the *Constitution* is consistent with the constitutional imperative of reconciliation between the Crown and Indigenous peoples, which mandates the pursuit of negotiated resolution of their respective sovereignties.[142] The parties intended for VGFN to be self-governing, and for their Settlement Land, *Constitution* and laws to

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[138] Joe, para 9, AR Vol. VII, Tab 5.12 at 3.
[139] Joe, para 9, AR Vol. VII, Tab 5.12 at 3; Josie #2, paras 15, 22, AR Vol. VIII, Tab 5.14 at 158-159, 161 and Exhibit A, AR Vol. IX, Tab 5.14 at 136-146; Tizya-Tramm, paras 21-22, AR Vol. VI, Tab 5.10 at 139-140; Bruce, para 9, AR Vol. VI, Tab 5.9 at 114.
[140] *Hape,* paras 41 and 43.
[141] *Desautel,* para 64.
[142] *Haida,* para 20.

be the foundation of their contemporary self-government over internal affairs including leadership selection.[143] The formal achievement of autonomy based upon mutual consent of the parties, following the history of suppression of VGFN's pre-existing governance and legal order, goes to the very spirit and intent of the Agreements.[144]

84. The *Constitution* is the cornerstone of the Agreements. With its intended role as VGFN's "supreme law", it is distinct from other law-making powers and "exclusive" self-government powers with respect to their internal affairs. The parties intended for the *Constitution* to provide a complete internal code guaranteeing the recognition and protection of the rights and freedoms of Citizens within a free, self-governing and democratic Vuntut Gwitchin society. The interpretation by the Courts below, however, subordinates VGFN's pre-existing legal and governance traditions and values to the *Charter* and its values. This deprives the meticulously negotiated solemn exchanges between the parties of their meaning and effect, and frustrates rather than furthers the purposes of s. 35. Such an interpretation is not consistent with the honour of the Crown, which recognizes the impact of the colonial practice of superimposing European laws and customs on Indigenous peoples and the special relationship that arises from this.[145]

85. The principle of reconciliation is respected if the *Constitution* is treated *as* a constitution.[146] The *Constitution*, with its source in VGFN's distinct legal culture, is of a *sui generis* character. It reflects the unique VGFN-Crown relationship and the ongoing process of reconciling sovereignties. The imposition of the *Charter* and its values, and the displacement of the *Constitution* as VGFN's "supreme law", seriously impairs VGFN's fundamental objectives as a self-governing Indigenous people seeking to recover from the harms of colonization and

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[143] Final Agreement, Preamble and ss 9.1.1, 9.5.7, 24.1.0, 24.2.0 and 24.5.0, AR Vol. III, Tab 5.8 at 60-61, 167, 169 and AR Vol. V, Tab 5.8 at 1, 2, 4-5.; SGA, Preamble and ss 2.0, 9.0, 10.0, 11.0, 13.0, 13.5.0, 13.6.0, 14.0, 20.1 and Schedule A, AR Vol. V, Tab 5.8 at 67-68, 75, 82, 83, 83-84, 86-95, 95-97, 107, 110-114.

[144] YKCA Reasons, para 144; YKSC Reasons, paras 11-13; Final Agreement, Preamble, AR Vol. III, Tab 5.8 at 60-61; SGA, Preamble, and s 2.0 AR Vol. V, Tab 5.8 at 67-68, 75; Bruce, paras 8-9, AR Vol. VI, Tab 5.9 at 113-114; Josie #2, paras 6, 14, 18 and Exhibit A at 150-151, AR Vol. VIII, Tab 5.14 at 156-157, 158, 159-160 and AR Vol. IX, Tab 5.14 at 131-132; Joe, paras 9-12, AR Vol. VII, Tab 5.12 at 3-5.

[145] *Manitoba Metis*, para 67.

[146] *Harpe v Massie and Ta'an Kwäch'än Council*, 2006 YKSC 01, para 94.

assimilation, in part through the maintenance and development of their laws and land-based system of governance.

86. Conversely, the honour of the Crown, embedded in the treaty-making standard of mutual consent, "works 'to avoid the indifference and lack of respect that can be destructive of the process of reconciliation that the Final Agreement is meant to address'."[147] It is not upheld by an interpretation inferring VGFN's consent to the application of the *Charter* in face of express rejection. Doing so fails "to take into account the Aboriginal perspective, the realities of colonization and displacement, and the goal of reconciliation."[148] It endangers the promise of reconciliation for VGFN and other Indigenous peoples throughout Canada who assert and exercise their inherent right to self-government but have not fully reconciled with the Crown by agreement (as the Crown is obliged to do).[149] Reconciliation, governed "by the law of good faith which, as between peoples must be the philosophy of their politics and the religion of their governments," is thwarted by a latter-day interpretation of treaties that imports limits on rights that were not agreed to.[150]

(iii) Democracy and the rule of law are upheld with the conclusion that the *Charter* does not apply

87. In a multi-jural legal order,[151] principles of democracy and the rule of law do not require imposition of Canadian law over Indigenous law.[152] Instead, as other courts have recognized in reviews of 'customary' Indigenous laws, respect for democracy entails deference to Indigenous law-making and internal decision-making processes.[153] This includes consideration of broad

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[147] *Beckman*, para 55.
[148] *Desautel,* para 12.
[149] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43, para 32; *Haida,* para 25.
[150] *Desautel,* para 89; *Beckman,* para 52; *Nacho Nyäk Dun*, para 37; *Badger*, para 41; 1972 Debates, at 448.
[151] Finch, Chief Justice Lance, "The Duty to Learn: Taking Account of Indigenous Legal Orders in Practice" (Paper delivered to CLEBC Indigenous Legal Orders and the Common Law, November 2012), [unpublished], para 1.
[152] *Reference re Secession of Quebec*, [1998] 2 SCR 217 [***Reference re Secession***], paras 61-62; Canada's Residential Schools: Reconciliation: The Final Report of the Truth and Reconciliation Commission of Canada, Volume 6 (Montreal: McGill-Queen's University Press, 2015) [**TRC Report**] at 49.
[153] *Pastion,* paras 22-23.

community acceptance established through enduring traditions and practices, and their continued evolution through internal deliberation and contemporary expressions of political will.[154]

88. A conclusion that the *Charter* does not apply to the Residency Requirement is harmonious with the constitutional principle of democracy and does not create a "jurisdictional ghetto" as suggested by the Appellant.[155] The Courts below failed to give adequate consideration and deference to the role of VGFN's pre-existing legal order and land-based governance traditions by applying the *Charter* to limit the authority of Citizens acting collectively through the GA.

89. Held up against the value of democracy, VGFN's tradition of direct, participatory and accountable decision-making is exemplary. The YKSC found that VGFN "have continued their governance practice of making significant decisions collectively through processes of community deliberation and discussion. This method of decision-making was and remains the foundation of Vuntut Gwitchin community self-sufficiency, culture and survival on the land."[156] The YKSC further found that Vuntut Gwitchin leaders reside on Vuntut Gwitchin Territory and that the Residency Requirement, and the requirement that the seat of VGFN government be on Settlement Land, are modern-day expressions of the pre-colonial Vuntut Gwitchin legal order and traditional governance system.[157]

90. It is simply incorrect to suggest that there is a legal vacuum if the *Charter* does not apply in this case. The *Constitution* provides for comprehensive structures and processes that include Citizens in law-making, through providing guarantees to run and vote for Council, to participate in regular meetings of the GA, to participate in the Elders Council, and to collectively decide on the terms of the *Constitution*. The Residency Requirement, including its most recent iteration, has been affirmed by a duly convened assembly open to all Citizens.[158] VGFN's position that the *Charter* does not apply to the Residency Requirement is not in conflict with the principle of

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[154] Grammond, Sébastien, Recognizing Indigenous Law: A Conceptual Framework, 2022 100-1 *Canadian Bar Review* 1, 2022 CanLIIDocs 1198 at 9 and 20, <https://canlii.ca/t/7j7sc>; citing Borrows, John, Canada's Indigenous Constitution (Toronto: University of Toronto Press, 2010) [**Borrows**] at 38-39; *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 732, paras 31-39, 77.
[155] Appellant's Factum, para 64.
[156] YKSC Reasons, para 12.
[157] YKSC Reasons, para 11-12.
[158] Bruce, paras 8-9, AR Vol. VI, Tab 5.9 at 113-114; Josie #1, paras 4-9, AR Vol. VI, Tab 5.11 at 159-161; Josie #2, paras 6-22, AR Vol. VIII, Tab 5.14 at 156-161.

democracy: rather, it recognizes and respects VGFN's long standing democratic processes on the basis of their inherent right to self-government protected by s. 35, the *Constitution*, the Agreements and in accordance with the right of Indigenous peoples to self-determination recognized within international and Canadian law.[159]

(iv) Non-application of the *Charter* is consistent with international law

91. The *United Nations Declaration on the Rights of Indigenous Peoples* ("***UNDRIP***") is an international human rights instrument with application in Canadian law.[160] Interpretations of domestic law that conform to international obligations should be favoured.[161]

92. Interpretation of s. 32 of the *Charter* must take *UNDRIP* into account,[162] including particularly its principle that Indigenous peoples have the right to self-determination. Self-determination includes, *inter alia,* rights to: (a) not be subjected to forced assimilation or destruction of their culture; (b) autonomy or self-government in matters relating to their internal and local affairs; (c) maintain and strengthen their distinct political, legal, economic, social and cultural institutions; (d) determine the structures and select the membership of their institutions in accordance with their own procedures; (e) promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards; and (f) determine the responsibilities of individuals to their communities.[163]

93. The Courts below erred by applying the *Charter* by default, in a manner inconsistent with the minimum international standards for the survival, dignity and well-being of Indigenous peoples enshrined in *UNDRIP*. Refusing to apply the *Charter* in this case is consistent with the self-determination and autonomy promised to Indigenous peoples, including VGFN under the Agreements.

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[159] *UNDRIP*; *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14 [***UNDRIP Act***].
[160] *UNDRIP Act*, s 4.
[161] *Nunatukavut Community Council Inc v Canada (Attorney General)*, 2015 FC 981 [***NCC***], para 103; *FN Youth Reference*, paras 508-513; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, paras 70-71; *Hape,* paras 35-39, 53-56.
[162] *UNDRIP Act*, s 4.
[163] *UNDRIP*, articles 3-5, 8, 33-35.

94. Non-application of the *Charter* to the Residency Requirement does not conflict with the individual rights of Indigenous people protected by UNDRIP,[164] or with other international human rights instruments ratified by Canada. Nothing in international law demands that a self-governing Indigenous people be subject to another jurisdiction's human rights code, particularly when they possess their own enforceable code protecting fundamental civil, political, social and economic rights of their citizenry in a manner consistent with international standards.

95. Contrary to the Appellant's assertion, the *Constitution* not only complies with the individual rights set out in *UNDRIP* and in the *International Convention on Civil and Political Rights* ("***ICCPR***"),[165] but expressly protects them on its own terms. Article IV of the *Constitution* recognizes and protects the individual rights and freedoms of Citizens in relation to exercises of self-government power by VGFN's governing bodies, including the "right to equal protection and benefit of VGFN law without discrimination" subject only to "such reasonable limits as can be demonstrably justified in a free and democratic Vuntut Gwitchin society".[166] The *Constitution* provides for remedies in cases where a Citizen's protected rights and freedoms may be affected by a VGFN law. The YKCA acknowledged that the Appellant had, and continues to have, the ability to pursue a claim under the *Constitution* rather than the *Charter*.[167]

4. Conclusion: the *Charter* does not apply to VGFN's Residency Requirement

96. A finding that the *Charter* is not applicable to the Residency Requirement does not result in a legal vacuum. Instead, it lays the foundation for a genuine reconciliation of the sovereignties and legal orders in issue. Such a conclusion is harmonious with the purposes of the *Charter,* the promise of s. 35, the principle of democracy, international law, and the project of reconciliation.

97. On the other hand, significant adverse effects on the future of VGFN self-government and law-making are certain if the *Charter* applies to the Residency Requirement. The Courts' prioritization of the Canadian state's human rights instrument over VGFN's own self-determined *Constitution* risks reviving old ghosts in the law such as the discriminatory legal concepts

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[164] See *UNDRIP*, articles 1-2 and 9. *UNDRIP* expressly recognizes and protects both individual and collective human rights of Indigenous peoples.

[165] Appellant's Factum, paras 100-104; *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[166] *Constitution*, Article IV, s 1, AR Vol. V, Tab 5.8 at 142.

[167] YKCA Reasons, para 157.

grounded in the "doctrine of discovery" which treated Indigenous peoples as lawless and incapable of managing their own affairs.[168] VGFN submits that such an interpretation is fundamentally inconsistent with the intentions of the parties to the Agreements and the purposes of s. 35. Instead of creating space for Indigenous peoples to maintain, strengthen and continue to develop their distinct legal and governance orders, it imposes a new form of assimilation where Indigenous peoples exist only "as negative reflections and shadows in the Eurocentric worldview."[169]

98. The Appellant's petition ought to have been answered by the Courts below within the four corners of the *Constitution* (as was pled by the Appellant in the alternative). VGFN submits that this outcome not only best reconciles the interests of the parties to the Agreements, but also ensures the Appellant's challenge to the validity of Residency Requirement is adjudicated by the courts in a manner consistent with the Agreements, *Constitution*, the Constitution of Canada as a whole, and *UNDRIP,* which provide for VGFN's realization of self-determination within Canada's constitutional fabric. The promise of constitutional space for "Aboriginal peoples to be Aboriginal"[170] under s. 35 requires respect for this arrangement.

B. Section 25 of the *Charter* provides a shield for VGFN's exercise of self-government

99. VGFN submits that if this Court determines that the *Charter* applies to the Residency Requirement, the Appellant's challenge under the *Charter* should be dismissed because of the effect of s. 25.

100. As correctly found by the Courts below, s. 25 requires a robust approach that gives effect to the special promise made to Indigenous peoples under s. 25 of the *Charter* by preserving the ability of self-governing Indigenous peoples to determine the structure and rules of their governing bodies under their own pre-existing legal orders.[171] This is consistent with the principle of respect and deference to self-government.[172] It is also necessary in order to avoid perpetuating the erasure

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[168] See *Johnson v M'Intosh,* 21 US (7 Wheat) 543 (1823) at 573 and 591, cited in *Calder,* at 320, 335, 380-84*; Guerin v The Queen*, [1984] 2 SCR 335 at 377-78, 380*; Sparrow* at 1103; Borrows at 17-21.
[169] Henderson, James (Sákéj) Youngblood, "Postcolonial Indigenous Legal Consciousness" (1 Indigenous Law Journal: 2002) [**Henderson**] at 4-6; Metallic at 5.
[170] *Desautel*, para 22.
[171] YKCA Reasons, paras 143-149; YKSC Reasons, paras 193-199.
[172] *Sioui* at 1055; *Pastion*, paras 22-23; *Edzerza,* paras 26-27; *Harpe*, para 94.

of Indigenous rights[173] contrary to s. 25, the Agreements, Canada's constitutional values, *UNDRIP*, and the Canadian legal system's duty to make genuine space for Indigenous legal orders.[174] An overly narrow approach to s. 25, such as that proposed by the Appellant, is fundamentally inconsistent with its text and with its protective purpose.

1. Section 25 must be interpreted to protect collectively held Indigenous rights

101. The Courts below correctly concluded that s. 25 of the *Charter* shields the Residency Requirement. This is confirmed by its text and its purpose: to preserve the space and the conditions required to protect rights and freedoms belonging to Indigenous peoples as Indigenous peoples. Section 25 must be interpreted in this way to allow for the diversity of Indigenous legal orders to exist and flourish within the Canadian legal system.[175]

(a) Charter guarantees shall not abrogate or derogate from Indigenous rights

102. On a plain reading, s. 25 is a mandatory "non-derogation clause" that protects collectively held Indigenous rights and freedoms:[176]

> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:
>
> any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
>
> any rights or freedoms that now exist by way of land claim agreements or may be so acquired.

The text of s. 25, which refers to "any" aboriginal rights or freedoms that "pertain to the aboriginal peoples of Canada" is broader in scope than the "existing" aboriginal rights "recognized and affirmed" for the purposes of s. 35.[177] The text is unambiguously protective of the rights it

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[173] See Beaton, Ryan, "Doctrine Calling: Inherent Indigenous Jurisdiction in Vuntut Gwitchin" (2022) 31(2) Constitutional Forum 39 at 45-47; Henderson at 37-44.
[174] Bauman, Honourable Chief Justice Robert J., "A Duty to Act" (Canadian Institute for the Administration of Justice's 2021 Annual Conference: Indigenous Peoples and the Law delivered at Vancouver, British Columbia, 17 November 2021) [unpublished] [**CJ Bauman**], paras 4-10; *FN Youth Reference*, paras 114 and 138; *UNDRIP Act*.
[175] *Desautel*, paras 22, 39; YKCA Reasons, para 143; Borrows at 209, 215.
[176] *Reference re Secession*, para 82; *R v Kapp*, 2008 SCC 41 ***[Kapp]***, paras 84-87, Bastarache J, concurring in the result; *Campbell*, para 156; YKCA Reasons, paras 143-149; YKSC Reasons, para 200.
[177] YKCA Reasons, para 66.

contemplates, given the terms "abrogate" (i.e., to repeal or do away with a law) and "derogate" (i.e., to repeal in part or to destroy, impair or lessen the effect of).[178] The words "shall not be construed" indicate that s. 25 is not a discretionary or solely interpretive rule.

(b) The purpose of s. 25 is to protect space for aboriginal, treaty and other rights

103. A purposive approach to s. 25 requires the provision to be interpreted in its full context and in light of the interests it is meant to protect, by reference to the language chosen for s. 25, and to the other constitutional provisions or documents associated with s. 25, such as s. 35, land claim agreements and the *Royal Proclamation of 1763*.[179]

104. The Courts below correctly identified that the purpose of s. 25 is to ensure that the rights and freedoms of Indigenous peoples and their special position within Canadian society are not eroded by the guarantee of *Charter* rights and freedoms to Canadians, and that s. 25 does this by providing a "shield" for Indigenous rights and freedoms.[180] This purpose is consistent with the fact of the pre-existence of autonomous Indigenous societies and their legal and governance traditions, which mandates their special constitutional status today.[181]

105. Interpreting s. 25 to meaningfully create space for Indigenous peoples' inherent rights to self-government over their internal affairs conforms with principles applicable to the *sui generis* Indigenous-Crown relationship. Those principles include that constitutional provisions concerning Indigenous peoples and their collective rights must be given a generous and liberal interpretation with any doubt or ambiguity to be resolved in favour of Indigenous peoples. Contrary to the Appellant's assertion, this interpretive principle prevails over *ejusdem generis*.[182]

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[178] YKCA Reasons, para 143, citing *The Queen v Drybones*, [1970] SCR 282 at 294; YKSC Reasons, paras 200, 205.
[179] *Van der Peet*, para 21; *Hunter* at 156-157; *Big M* at 344.
[180] YKCA Reasons, paras 143-149; YKSC Reasons, paras 195-200; *Kapp*, paras 80-81, 89, Bastarache J, concurring in the result; *Batchewana Indian Band (Non-resident members) v Batchewana Indian Band*, [1997] 1 FC 689 (FCA) [**Batchewana FCA**], paras 23-26, *Corbiere v Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203 [***Corbiere***], paras 51-54; *Campbell*, paras 153-158; *FN Youth Reference*, para 528; *Desautel*, para 39.
[181] *Van der Peet*, paras 26-30; *Mitchell v MNR*, paras 9-10; *Reference re Secession*, paras 81-82.
[182] *Mitchell v Peguis Indian Band*, [1990] 2 SCR 85 at 113-114; *Van der Peet*, paras 23-25; Appellant's Factum, para 67.

106. Section 25 must be understood in the context of s. 35. Section 35 represents a distinct but complementary promise made to Indigenous peoples for the reconciliation of assumed or asserted Crown sovereignty with their prior sovereignty, occupation and control, providing constitutional space for "Aboriginal peoples to be Aboriginal."[183] The necessary constitutional space promised under s. 35 and protected by s. 25 must be vigorously safeguarded in order for Indigenous peoples to be self-determining over their own lives and futures, to maintain their unique and valid legal cultures, and to recover from the "historical injustice suffered by aboriginal peoples at the hands of colonizers."[184] The ongoing project of truth and reconciliation in Canada makes this imperative.[185]

(c) Section 25 must be applied generously and in a manner consistent with its purposes

107. The YKCA correctly held that s. 25 is *not* to be "'another framework' for balancing, 'reading down', or modification."[186] The purpose of s. 25 is to protect collectively held rights and freedoms of Indigenous peoples from abrogation or derogation as a result of the assertion of *Charter* rights and freedoms by individual Canadian citizens. It is not a form of reconciliation of distinct sovereignties as under s. 35, a balancing of interests, nor an assessment of proportionality. The YKCA followed Bastarache J. in *R. v Kapp*:

> ...There should be no reading down of s. 25 while our jurisprudence establishes that aboriginal rights must be given a broad and generous application, and that where there is uncertainty, every effort should be made to give priority to the aboriginal perspective.[187]

108. The YKCA properly acknowledged that reconciliation would not be achieved by applying s. 25 as merely an interpretive lens. Rather, the protective purpose of s. 25 is achieved by "giving primacy to the Aboriginal right in question, consistent with the wording and history of the provision and with pronouncements of the government when the *Charter* was amended in 1982."[188] The YKCA found that respecting other sections of the *Charter*, and similar terms in the

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[183] *Desautel,* para 22; *NFL SCC*, para 207; *Delgamuukw*, para 186; *Van der Peet*, paras 31, 36 and 43; *Mitchell v MNR*, paras 134, 164.
[184] *Desautel*, para 33; YKCA Reasons, para 144; See Swiffen, Amy, "Dickson v Vuntut Gwitchin First Nation, Section 25 and a Plurinational Charter" (2022) 31:2 Constitutional Forum 27.
[185] CJ Bauman, paras 8, 10.
[186] YKCA Reasons, para 146.
[187] YKCA Reasons, para 145; *Kapp*, para 110, Bastarache J. concurring.
[188] YKCA Reasons, para 121.

Canadian Bill of Rights, the phrase 'shall not be construed' has been interpreted by this Court to constitute a bar to competing rights.[189]

109. VGFN submits that when considering any application of the *Charter* that may abrogate or derogate from any rights or freedoms pertaining to Indigenous peoples, the task of the Courts is to determine based on the pleadings: (a) whether, *prima facie*, the particular rights or freedoms at stake are within the scope of s. 25's protection; and (b) whether, *prima facie*, the relief sought would, if granted, impermissibly abrogate or derogate from that right or freedom. VGFN submits that s. 25 is engaged at the outset in cases such as this, where the Court is asked to consider a *Charter* challenge to the validity of an Indigenous law enacted pursuant to the exercise of collectively-held self-government rights or freedoms. Section 25 requires that the *Charter* "shall not" be construed to diminish the self-government rights or freedoms at stake – in this case, the autonomy of VGFN to govern the selection of their leaders under their *Constitution* and laws, which would be foreclosed if the relief sought by the Appellant were granted.

(i) A treaty or declaration of s. 35 rights is not required

110. The application of s. 25 does not require or call for "proof" of an "existing" aboriginal right under the *Van der Peet* test.[190] The approach urged by the Appellant would effectively require a trial to determine "existing" aboriginal rights, or the search for some other undefined "constitutional character."[191] The Appellant's approach is unworkable in practice and would render s. 25 inaccessible, exposing all 'unproven' or denied rights of Indigenous peoples to abrogation or derogation.[192] The Courts below properly rejected such an approach given that if s. 25 was not interpreted more broadly than the wording of s. 35, the promise of giving Indigenous peoples "protected space" would "ring hollow."[193] Consistent with this Court's judgment in *Haida*, a court's declaration of an existing aboriginal right is not necessary for impacts to the right to be assessed, which avoids "treating reconciliation as a distant legalistic goal."[194] Courts are "perfectly capable of taking into account the constitutional dimension of the rights asserted."[195]

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[189] YKCA Reasons, para 122. See also *Kapp*, paras 87-88, Bastarache J. concurring.
[190] Appellant's Factum, para 81.
[191] Appellant's Factum, paras 69-79.
[192] McNeil, Kent, "The Inherent Indigenous Right of Self-Government" (May 4, 2022) at 5.
[193] YKCA Reasons, para 127.
[194] *Haida*, para 33; *Kapp*, para 109.
[195] *Beckman*, para 47.

111. Contrary to the Appellant's argument, s. 25's purpose is not the reconciliation of VGFN's prior sovereignty with assumed Crown sovereignty and Canadian society at large. Nor is it this Court's task in addressing the Appellant's claim. Unlike s. 35, s. 25 does not create independently enforceable legal rights or obligations that pertain to Indigenous peoples in relation to the Canadian state. VGFN does not seek "recognition and affirmation" under s. 35 in this proceeding (nor could they as a respondent in a summary proceeding commenced by petition).[196] Instead, the pre-existing Indigenous legal orders "that defined the various aboriginal societies as distinctive cultures" are *presumed* to have survived the assertion of Crown sovereignty while continuing as aboriginal rights for the purposes of s. 25.[197]

112. The Appellant claims that s. 25 protection is limited to rights of a "constitutional character", meaning with "constitutional status within Canada."[198] To the extent that this is a component of the analysis, it cannot be taken to mean that a court declaration or recognition by the Crown of an "existing" aboriginal right is a pre-condition for s. 25 to apply. This is apparent from the text of s. 25 which is inclusive of "*any* aboriginal, treaty *or* other rights or freedoms."

113. While the Courts below did not find that a "constitutional character" must be proven to engage s. 25, they nonetheless determined that the Residency Requirement fit such a description, being a VGFN law within the *Constitution* itself, one that "clearly intended to reflect and promote VGFN's particular traditions and customs relating to governance and leadership."[199]

2. The Residency Requirement is within the scope of s. 25 protection

(a) The Residency Requirement is a protected exercise of VGFN's inherent self-government rights and freedoms

114. VGFN submits that the YKCA correctly construed the scope of s. 25 protection as encompassing the Residency Requirement in its entirety. VGFN's inherent right to self-government, which includes their selection of leaders, is *prima facie* an aboriginal or other right or freedom for the purposes of s. 25. This inherent right stands to be impacted by the Appellant's *Charter* challenge to the Residency Requirement, and is presumptively within the scope of s. 25's

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[196] *Desautel*, paras 87-91; *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56, paras 11-12; *Prophet River First Nation v Canada (Attorney General)*, 2017 FCA 15, paras 78-80 (leave to appeal denied); *Yukon Rules of Court*, OIC 2009/65, Rule 10.
[197] *Mitchell v MNR*, para 10; *Desautel*, paras 67-70.
[198] Appellant's Factum paras 75-79.
[199] YKCA Reasons, para 147.

protection.[200] The Residency Requirement is properly characterized, as affirmed by the Courts below, as an exercise of a VGFN "aboriginal" right within the meaning of s. 25, on the basis of both Vuntut Gwitchin and Canadian common law perspectives.[201]

115. Contrary to the Appellant's argument that the self-government right asserted by VGFN was not distinctive or integral to its identity as an Indigenous people,[202] the YKCA found:

> The evidence is persuasive that among the discerning features of the Vuntut Gwitchin society is the emphasis it places, and has always placed, on its leaders' connection to the land, their expectation of ongoing personal interaction between its leaders and others, and their wish to resist the "pull" of outside influences. In this sense, the First Nation's adoption of the Residency Requirement constitutes the exercise of a right that in its modern form "pertain[s] to the aboriginal peoples of Canada".[203]

116. Through this collective exercise of self-government by the GA regarding the selection of their leaders, VGFN seeks to protect and promote VGFN's spiritual and economic relationship to the Traditional Territory; the Vuntut Gwitchin way of life including democratic deliberation and consensus-based decision-making among Citizens; and the general welfare of the collective.[204]

(b) VGFN's rights also exist "by way of land claim agreements"

117. Given the close nexus between the Agreements and the *Constitution*, VGFN's right and freedom to adopt the Residency Requirement is also an aboriginal or other right or freedom pertaining to VGFN that exists "by way of land claim agreements or may be so acquired" and is therefore protected by s. 25. A defining achievement of the Agreements and *Constitution* is their provision for the autonomy of VGFN and their Citizens (comprising the GA) in matters related to the selection of leaders. Through the Chapter 24 blueprint the parties to the Final Agreement intended to recognize VGFN's collective, exclusive right to be self-governing over their own lands and internal affairs under their own *Constitution* and laws.[205] They also made good faith commitments to explore a form of negotiated s. 35 protection for VGFN self-government in the

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[200] *Mitchell v MNR*, paras 9-13; *Campbell,* para 103; *Pastion*, para 12 citing *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536, para 34; YKSC Reasons, paras 11-12, 44, 131, 145 and 206-212.
[201] YKCA Reasons, para 147; YKSC Reasons, paras 207, 212.
[202] Appellant's Factum, paras 80-85.
[203] YKCA Reasons, para 147 [emphasis added].
[204] See references at footnote 3.
[205] Final Agreement, ss 24.1.0, 24.2.1, 24.5.0, AR Vol. V, Tab 5.8 at 1, 2, 4-5.

future. This hard-fought negotiated space for self-government rights and freedoms is critical to addressing the legacy of colonial harms, and is precisely what s. 25 was intended to shield from abrogation or derogation.

(c) Restrictions on the scope of s. 25 proposed by the Appellant are not supported

118. The Appellant seeks to exclude VGFN's self-government rights and freedoms from the scope of s. 25. Such exclusion would improperly permit the abrogation and derogation of VGFN's inherent right to self-government and severely limit VGFN's collective rights protected by s. 35. This is analogous to allowing the lands and resources subject to a strong *prima facie* claim of aboriginal rights to be irreparably altered pending a Court declaration or Crown recognition of their existence as s. 35 rights: "This is not reconciliation. Nor is it honourable."[206]

119. The Appellant argues that practices described as giving rise to "intra-group distinctions" are not contemplated under s. 25, arguing such distinctions cannot be aspects of a collective right because they affect individuals differently within a group. The Appellant argues these distinctions cannot enhance "Indigenous difference".[207] This position fundamentally misunderstands the nature of a collective right. The collective right protected by s. 25 in this case is the right to self-govern on the basis of a pre-existing Indigenous legal order, and is grounded in the identity of the Vuntut Gwitchin as an Indigenous people. As in any society, an individual may be affected by a governance decision made by a collective that differentiates or draws a line based on a policy aim. The limit on s. 25 proposed by the Appellant suggests that any such policies cannot form part of a protected exercise of Indigenous law. If accepted, this would deprive a vast array of possible exercises of governance from protection, hollowing out the right itself. A collective right at times requires individual rights to give way; this is not inconsistent with the existence of the collective right.[208]

120. The Appellant similarly proposes an internal limit on s. 25, foreclosing its protection where the *Charter* claim is one based on alleged discrimination.[209] This thesis is contradictory to the text of s. 25 which specifically promises protection of aboriginal, treaty and other rights against

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[206] *Haida*, para 33.
[207] Appellant's Factum, para 64.
[208] *Kapp*, para 89, Bastarache J. concurring.
[209] Appellant's Factum, para 89.

constructions of *Charter* guarantees that would limit or impair them. Nothing in text or in principle suggests that s. 15(1) *Charter* claims are excluded and would bypass s. 25's shield.

121. The Appellant's argument that s. 25 is only meant to protect federal, provincial and Indigenous initiatives that seek to further interests specifically targeted at preserving or enhancing "Indigenous difference" within Canada would result in an impoverished version of s. 25[210] that could not have been intended by the framers and would exclude a wide range of exercises of governance rights. In any event, the Residency Requirement is a provision that seeks to preserve and enhance "Indigenous difference" through the continuation of an inherent Indigenous legal order that survived colonization and for which VGFN has secured space in the fabric of the Canadian legal system.

3. Section 25 is a complete shield to the Appellant's claim under s. 15(1)

122. The purpose of s. 25 is protection, not balancing or reconciliation. VGFN submits that it is a shield that protects their exercise of collectively held self-government rights and freedoms, and promotes the maintenance, strengthening and continued development of VGFN's living constitutional and legal order. The YKCA correctly concluded that "to apply s. 15(1) would indeed derogate from the Vuntut Gwitchin's rights to govern themselves in accordance with their own particular values and traditions and in accordance with the 'self-government' arrangements entered into in 1993 with Canada and Yukon."[211] The analysis should end there.

(a) A shield does not result in a legal vacuum

123. The spectre raised by the Appellant's arguments about a vacuum of protection for the individual rights and freedoms of Citizens within contemporary VGFN self-government is illusory.[212] The approach to s. 25 described here and adopted by the YKCA is consistent not only with the words and purpose of the text but also with written and unwritten constitutional and legal principles. A s. 25 shield is consistent with the values of reconciliation, democracy, the rule of law and the need for keeping space for Indigenous peoples to find the appropriate balances of collective and individual rights and freedoms in accordance with their distinctive cultures (as argued above).

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[210] Appellant's Factum, para 63.
[211] YKCA Reasons, para 146.
[212] Appellant's Factum, paras 64, 84.

It is also consistent with *UNDRIP* and the rights of Indigenous peoples to self-determination as applicable within Canadian law.[213]

124. To the extent that this Court is concerned about the ability of Citizens to enjoy the protection of their individual rights and freedoms within contemporary VGFN self-government, there is a full answer in the Agreements themselves. The *Constitution*, pursuant to the Agreements, was required to both guarantee the rights and freedoms of Citizens and to provide a process to adjudicate any breaches of those rights and freedoms. Failing to provide those would be inconsistent with the parties' expectations and commitments, and would be remediable. As the YKCA correctly observed, "having pursued her claim under the *Charter*, Ms. Dickson may elect hereafter to pursue a similar claim under the VGFN Constitution. That process would of course be subject to Vuntut Gwitchin law and principles." An approach deferring to the *Constitution* properly respects VGFN's autonomy over internal governance matters[214], gives effect to the Agreements, and advances reconciliation by allowing Indigenous peoples to be Indigenous by maintaining, strengthening and continuing to develop their own legal traditions.

(b) Carrying out a full s. 15 analysis is contrary to the protective purpose of s. 25

125. A purposive interpretation further requires s. 25 to be applied at the outset of the analysis of a *Charter* claim that could result in the abrogation or derogation of any Indigenous rights and freedoms. Subjecting the Residency Requirement to a full s. 15(1) analysis rather than finding s. 25 to be a complete answer is not the correct approach.[215] Section 25 is mandatory, not discretionary, and must be engaged at the outset in order to fulfill its purpose.

126. The shield of s. 25 must be a meaningful and practical one. The YKCA acknowledged that conducting a full analysis of s. 15(1) would derogate from VGFN's collectively held self-government rights and freedoms and concluded in this case that it was not necessary or desirable to do so.[216] The YKCA held that the application of s. 25 "obviates" the need for a s. 15 analysis.[217] It further cautioned that "if courts were expected to analyze fully the ss. 15 and 1 implications of a *Charter* claim before considering the applicability of s. 25, it would be difficult, if not impossible,

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[213] *UNDRIP Act*, s 4(a).
[214] YKCA Reasons, para 54.
[215] YKCA Reasons, para 63.
[216] YKCA Reasons, para 151.
[217] YKCA Reasons, para 146.

to keep s. 25 considerations separate from the issue of reasonable limits and perhaps from s. 15(1) itself. The result would be the weighing of individual rights against collective rights and the 'reading down' of one or the other, or both."[218] This is what a shield properly avoids.

127. The YKCA acknowledged the risk that beginning with a s. 15(1) analysis would undermine the purpose of s. 25 expressed in its words and in the light of the interests it aims to protect, and accepted that would result in self-governing Indigenous peoples spending "significant resources defending moot challenges ultimately prohibited by s. 25".[219]

4. Conclusion: the Residency Requirement is preserved by s. 25

128. Shielding and making space for VGFN's exercise of self-government in selection of their leaders is consistent with the calls of the Royal Commission on Aboriginal Peoples, Truth and Reconciliation Commission of Canada ("**TRC**"), and the National Inquiry into Missing and Murdered Indigenous Women and Girls, which have each highlighted that respect for Indigenous legal orders is central to any process of reconciliation. This is particularly so here. Under the VGFN *Constitution*, a self-governing Indigenous people have together recognized and protected the individual rights and freedoms of Citizens under their own laws, and from their distinct legal perspectives.[220] As set out by the TRC in its 2015 final report:

> Aboriginal peoples must be recognized as possessing the responsibility, authority, and capability to address their disagreements by making laws within their communities. This undertaking is necessary to facilitate truth and reconciliation within Aboriginal societies.[221]

C. The Residency Requirement does not infringe s. 15(1) of the *Charter*

129. The analysis under s. 15(1) asks: (a) whether an impugned law imposes differential treatment based on an enumerated or analogous ground; and (b) whether the effect of the distinction is to discriminate in a substantive sense.[222] VGFN submits that each question must be

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[218] YKCA Reasons, para 152.
[219] YKCA Reasons, para 153.
[220] Canada, Royal Commission on Aboriginal Peoples, Restructuring the Relationship, vol 2 (Ottawa: Canada Communication Group, 1996) at 219 and 222; Canada's Residential Schools: Reconciliation at 45-54 and 74-79; Canada, National Inquiry into Missing and Murdered Indigenous Women and Girls, Reclaiming Power and Place, vol 1a (2019) [**MMIWG Report, vol 1a**] at 221-224 and vol 1b (2019) at 174-175.
[221] TRC Report at 51.
[222] *Fraser v Canada*, 2020 SCC 28 [***Fraser***], paras 27, 42.

assessed in a manner that does not reflexively apply this Court's decision in *Corbiere.* Fundamentally, the "actual impact of the provision in its full context" governs the analysis, including understanding the legislative scheme in issue and the claimant's place within it and more broadly.[223] VGFN submits that neither branch of the test is met and the Appeal can be disposed of on the basis that the Appellant has not advanced a valid claim under s. 15(1).

1. The distinction in the Residency Requirement is not based on a prohibited (enumerated or analogous) ground

130. The Residency Requirement provides that an eligible candidate who has been elected as Chief or Councillor must reside on Settlement Land. Practically speaking, this means those elected must relocate if they do not already reside in Old Crow. On its face, the Residency Requirement would affect non-resident Citizens elected to Council differently than residents.

131. While the Residency Requirement creates a distinction, it does not do so on the basis of a ground listed in s. 15. VGFN submits that neither does the analogous ground called "Aboriginality-residence" apply to this case. The distinction in question here is better understood as a distinction on the basis of residence, which this Court has found is not a prohibited ground.[224] There is thus no need to proceed to the next stage of the s. 15(1) analysis.

(a) Aboriginality-residence is not applicable to the Residency Requirement

132. Both Courts below concluded or assumed that the distinction in this case was one made on the analogous ground "Aboriginality-residence," originating in *Corbiere*.[225] This Court in *Corbiere* found that s. 77 of the *Indian Act,* which disqualified all band members not residing on reserve from voting in any band election, gave rise to a distinction based on off-reserve band member status. It determined based on evidence about the oppressive and harmful effects imposed by Crown policy, that being an *off-reserve band member* should be confirmed as an analogous ground of discrimination under s. 15(1) of the *Charter*.[226] It gave this ground the moniker "Aboriginality-residence."

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[223] *R v CP*, 2021 SCC 19 [***CP***], para 145; *Withler v Canada (Attorney General)*, 2011 SCC 12 [***Withler***], paras 65, 67, 73, 76, 79.
[224] *R v Turpin*, [1989] 1 SCR 1296 [***Turpin]*** at 1333; *Corbiere*, para 13; *Siemens v Manitoba (Attorney General)*, 2003 SCC 3, paras 47-48; *Canadian Snowbirds Association Inc v Attorney General of Ontario*, 2020 ONSC 5652, para 73.
[225] YKSC Reasons, para 148; YKCA Reasons, para 107.
[226] *Corbiere,* para 6.

133. In finding that the Residency Requirement here fell within "Aboriginality-residence," the Courts failed to correctly consider the vital context of the Residency Requirement, and its significant differences with the context that led to the finding in *Corbiere*. This decontextualized approach led to an incorrect characterization of the distinction in issue and extended the analogous ground beyond fair or reasonable bounds.

134. Although both Courts below applied the ground of "Aboriginality-residence," the reasons of the YKSC, in substance, reject an automatic application of *Corbiere,* and prefer an approach sensitive to the diverse realities, experiences, history, perspectives and identity of Indigenous peoples, and deferential to Indigenous self-government.[227] The essence of the YKSC decision is that the type of distinction in question is not inherently suspect. While the YKSC addressed this mis-fit at the second stage of the s. 15 analysis, VGFN submits that it would be properly addressed at the earlier stage of determining whether the distinction is based upon a prohibited ground at all. VGFN submits it is not and that the claim can be dismissed on that basis.

(i) Analogous grounds protect disadvantaged groups

135. This Court has made clear that the scope of s. 15 protection is strictly limited to distinctions based on enumerated or analogous grounds.[228] Analogous grounds are grounds of distinction similar to those listed in the *Charter* in the sense that they reveal suspect decision-making or potential discrimination, being associated with historic disadvantage.[229] These are characteristics that are "immutable, difficult to change, or changeable only at unacceptable personal cost."[230] To date, other analogous grounds this Court has identified include citizenship, marital status and sexual orientation.[231]

136. When a distinction on the basis of an analogous ground is alleged, a court must consider whether the ground applies on the facts of the case.[232] It is not sufficient for a court, where factual

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[227] YKSC Reasons, para 161.
[228] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 [***Andrews***] at 180-181; *Turpin* at 1332-1333*; Reference re Workers Compensation Act, 1983 (NFLD)* [1989] 1 S.C.R. 922; *Withler*, para 33.
[229] *Corbiere,* paras 8, 13.
[230] *Corbiere*, para 60, L'Heureux-Dube J. concurring.
[231] *Andrews* at 180, 182, 195*; Miron v Trudel*, [1995] 2 SCR 418 at 497, 502, *Egan v Canada*, [1995] 2 SCR 513 at 528, 599-601.
[232] *Law v Canada (Minister of Employment and Immigration),* [1999] 1 SCR 497 [***Law v Canada***], paras 41, 93.

circumstances are meaningfully distinct, to reflexively assume that an ill-fitting distinction will apply simply because it has been given a moniker that, on the surface, sounds fitting. Justice Wilson commented in *Andrews* that the identification of an analogous ground looks at an affected group in its social context, noting "this is a determination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society."[233] Accordingly, an identified analogous ground, where it *fails* to accord with the place of a group in its entire social, political and legal context, is not applicable and does not extend to that group. Claims that residence is an analogous ground have failed.

(ii) Aboriginality-residence in *Corbiere*

137. In *Corbiere*, this Court's analysis in support of the recognition of the new ground termed "Aboriginality-residence" by the majority[234] was principally carried out by Justice L'Heureux-Dubé in her concurring reasons (adopted by the majority), concluding that "off-reserve band member status"[235] is a ground involving a "discrete and insular minority."[236]

138. The facts and context that attracted recognition of the ground must inform its definition and meaning. In *Corbiere*, "Aboriginality-residence" was accepted as analogous because the claim was brought by a historically disadvantaged subset of Indigenous people. The disadvantage recognized was rooted in the fact that on/off-reserve distinctions had been imposed and exacerbated by the *Indian Act*, and used as tools of exclusion and assimilation *by Canada*.[237]

139. The facts relied on in *Corbiere* were expressly focused on *Indian Act* bands and the oppressive Crown policies that had led, in that case, to the complete exclusion of a majority of band members from both residing on the band's reserve lands and running and voting in band council elections.[238] Particularly significant facts included: that colonial policy led to Indigenous

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[233] *Andrews* at 152; *Law v Canada*, para 29.
[234] *Corbiere,* para 6.
[235] Justice L'Heureux-Dube's decision does not use the term "Aboriginality-residence".
[236] *Corbiere*, para 62, L'Heureux-Dube J. concurring, see also paras 13, 15, 71, 91.
[237] *Corbiere,* paras 80-90, L'Heureux-Dube J. concurring.
[238] *Corbiere*, paras 26-30, L'Heureux-Dube J. concurring; *Batchewana FCA*, paras 9-12, 29-32, 35-37; *Batchewana Indian Band (Non-resident members) v Canada*, [1993] FCJ No 896 (FC), [1994] 1 FC 394 (QL)(FC) [***Batchewana FC***], para 26.

peoples losing most of their traditional land base;[239] that policy expressed through the *Indian Act* and related statutes and regulations, including the racist and sexist legislation that resulted in deprivation of Indian status, created a situation where Indigenous peoples were dislocated from their reserve lands;[240] and that further Crown regulation then disentitled band members from voting if they were not on-reserve residents.[241] In *Corbiere*, the impugned policy was a component of Canada's *Indian Act* policy which disenfranchised anyone not residing on reserve lands, exacerbating a history of intentional displacement and the harmful effects of colonialism, particularly political disempowerment.[242]

140. Understood correctly, "Aboriginality-residence" refers to the on- and off-reserve distinctions that are regulated under the *Indian Act* or exercises of jurisdiction empowered by the *Indian Act*.[243] This is apparent in the *Corbiere* judgment, where the majority of the Court adopted both the factual background of the decision stated in the concurring reasons of Justice L'Heureux-Dubé, and her conclusion that the distinction in question was suspect, amounting to an analogous ground affecting off-reserve members as a vulnerable group.[244]

141. The majority in *Corbiere* confirmed that analogous grounds are "constant markers of suspect decision making or potential discrimination," expressing that it is not context-dependent whether a ground will apply.[245] At no point, however, did the Court extend the capture of the Aboriginality-residence ground outside of the *Indian Act* on- or off-reserve distinction, or to any other setting. Rather, both the majority and concurring judgments defined it as relating specifically to off-reserve band members. Justice L'Heureux-Dubé's decision expressly sets out that the ground applies to "this combination of traits." It makes "no findings about 'residence' as an analogous ground in contexts other than as it affects *band members who do not live on the reserve of the band to which they belong*."[246]

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[239] *Corbiere*, para 27, L'Heureux-Dube J. concurring.
[240] *Corbiere*, para 30, L'Heureux-Dube J. concurring; *Batchewana FC*, paras 9-10.
[241] *Corbiere*, para 29, L'Heureux-Dube J. concurring.
[242] Canada, Royal Commission on Aboriginal Peoples, *Looking Forward Looking Back*, vol 1 Ch 6 (Ottawa, 1996) at 130-176.
[243] *Corbiere*, paras 6 and 58, 62, L'Heureux-Dube J. concurring.
[244] *Corbiere*, paras 14, 16, and 62, L'Heureux-Dube J. concurring.
[245] *Corbiere*, paras 8, 12.
[246] *Corbiere*, para 62, L'Heureux-Dube J. concurring [emphasis added].

(iii) "Aboriginality-residence" does not fit in this case

142. A contextual and purposive approach is fundamental to *Charter* interpretation: the subject of the dispute must be understood in its actual context, not rigidly, automatically or coloured by presumptions that do not apply.[247] Accordingly, courts are not bound to apply case law articulated in response to *Indian Act* policies where the context is distinct.

143. "Aboriginality-residence," as defined by this Court, does not apply on its face to the Appellant's claim. The analogous ground's raison d'être was discrimination against off-reserve band members, deriving from the *Indian Act*. The *Indian Act* regulates reserves, bands, and band membership, and the legal status of "Indians." The *Indian Act* does not apply to VGFN. VGFN is not a "band." VGFN does not have and has never had a reserve.[248] Citizens are not band members under the *Indian Act*, but Citizens under the *Constitution*. The Residency Requirement is not imposed by the Crown, but by VGFN Citizens freely and democratically exercising their inherent right to self-government. No principled reason warrants extending the off-reserve band member distinction called "Aboriginality-residence"[249] to shoehorn in the GA's enactment of the Residency Requirement as a suspect form of decision-making.

144. It is inconsistent with the imperative of reconciliation and the evolution of self-government in the Canadian context to impose legal conclusions onto VGFN that were decided in response to unmitigated harms imposed by Canada's *Indian Act*. If the distinctions between VGFN's law and the *Indian Act* provision in *Corbiere* are not acknowledged, VGFN's remarkable achievement of confirming their ongoing self-governance is deprived of meaning. If VGFN's Citizens are viewed as if they were "band members," and their Settlement Land treated as if it were a "reserve," the unique accomplishment of preserving and carrying out inherent self-government – outside of the "divisive and contradictory" *Indian Act* framework – will be disrespected and undermined.[250]

(b) There is no other applicable prohibited ground

145. The Appellant's argument amounts to a claim that a new analogous ground should be recognized: distinctions based on being a citizen of a self-governing Indigenous people who does not reside in the self-governed territory, on the lands owned by their Nation. This proposition

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[247] *Withler*, para 37.
[248] *Ross River Dena Council Band v Canada*, 2002 SCC 54, para 78.
[249] See *Thompson v Leq'a:mel First Nation Council*, 2007 FC 707, paras 11-18.
[250] Josie #2, Exhibit A, AR Vol IX, Tab 5.14 at 131-132.

should not be adopted. A new analogous ground is not identified lightly[251] and will not be confirmed unless it can be shown that differential treatment premised on the ground has the potential to affect dignity in the manner other s. 15(1) grounds are concerned with.[252]

146. The exercise of defining an analogous ground involves identifying "a type of decision making that is suspect because it often leads to discrimination and denial of substantive equality."[253] In *Corbiere,* inherently suspect decision-making underpinned the impugned law because of the history of oppressive policies of assimilation and disenfranchisement perpetuated by Canada respecting off-reserve band members. That conclusion is inapplicable to the Appellant's claim. The distinction at work in the Residency Requirement, considered in its entire social context, is not inherently suspect as is a race-based distinction or the off-reserve distinctions imposed by colonial policy. It should not be found to give rise to a new analogous ground.

147. By contrast to the *Indian Act* policies in *Corbiere*, the Residency Requirement is aimed to enhance VGFN self-government and sustain connection to the Traditional Territory. VGFN exercises their inherent right to self-government, and like any other self-governing people, defines the process for selection of their leaders. The distinction created by the Residency Requirement requires Citizens elected to Council to reside where the traditional seat of government is located in order to conduct day-to-day responsibilities of a self-governing Indigenous people. It is far from a "constant marker of suspect decision making" or of potential discrimination. It does not subject a group subject to historic disadvantage to differential treatment, or bear the kind of stigma reflected in *Corbiere*.

148. The distinction drawn by the Residency Requirement is made in furtherance of the effort to address assimilation and promote autonomous land-based self-government. VGFN should not be forced to wear the stain of discriminatory federal laws and policies historically imposed by Canada. The GA's consensus decision-making in this case, aimed at the continuity of VGFN's self-government and legal order, is not analogous or comparable to Canada's policies of concern in *Corbiere*. Here, the political, social and legal context of the Residency Requirement includes

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[251] *Fraser*, paras 114-123; *Withler*, para 33.
[252] *Law v Canada*, para 93.
[253] *Corbiere*, para 8.

and is informed extensively by VGFN's distinct legal culture and history of achievement of self-government, with its intentional departure from the capture of the *Indian Act*.

149. Furthermore, unlike in *Corbiere*, non-resident Citizens are not a group who can be identified as having historically experienced discrimination or stereotype so as to draw the protection of an analogous ground.[254] They cannot be characterized as "politically powerless": they are entitled to vote, to run for office, and to participate in the GA as well as the other governing bodies of VGFN.[255] Unlike in *Corbiere*, litigation is not the only means by which Citizens like the Appellant can be heard.[256]

150. Here it must be asked squarely how it would be inherently suspect for VGFN to impose a residency requirement for its government, based on its own culture and tradition, when it is not suspect for other governments within Canada to do so.[257] VGFN submits that it should not be viewed as suspect for Indigenous people to choose for themselves a rule that requires their government to be based on their traditional lands. Calling it suspect in fact results in discriminatory consequences for Indigenous peoples and their pursuit of self-determination. The Residency Requirement's distinction on the basis of residence should no more be captured by an analogous ground than Yukon's requirement of 12 months' prior residency to qualify as a candidate for the legislature, or even to vote in a territorial election.

151. VGFN submits that because the Residency Requirement is not based on any prohibited (enumerated or analogous) ground, the Appellant's claim under s. 15(1) fails.

2. The Residency Requirement is not discriminatory

152. The second stage of the s. 15(1) analysis, is particularly concerned with substantive rather than formal equality.[258] This understanding of equality requires attention to the "full context of the claimant group's situation," to the "actual impact of the law on that situation," and to the "persistent systemic disadvantages [that] have operated to limit the opportunities available" to that

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[254] *Corbiere*, para 13.
[255] *Batchewana FCA*, para 42; *Andrews,* at 152 per Wilson J; *Law v Canada,* para 29.
[256] *Batchewana FCA*, para 43.
[257] *Legislative Assembly Act*, RSY 2002, c 136 [***Legislative Assembly Act***], referentially incorporating *Elections Act*, RSY 2002, c 63 [***Elections Act***]; *Municipal Act*, RSY 2002, c 154 [***Municipal Act***]; *Reference Re Yukon Election Residency Requirement*, [1986] YJ No 14 (YTCA) [***Re Yukon Election***].
[258] *Fraser*, para 42; *Ontario (Attorney General) v G,* 2020 SCC 38 [***Ontario v G***], paras 43-47.

group's members.[259] Not all distinctions, even on grounds that may otherwise be suspect, are discriminatory.[260] There is no rigid template for the analysis; the goal is to examine the harms of the provision and determine whether it "has the effect of reinforcing, perpetuating, or exacerbating disadvantage."[261]

153. Contrary to the conclusion of the YKCA, the distinction drawn by the Residency Requirement is not inconsistent with s. 15(1). It does not deny the Appellant substantive equality and should not be construed as a harm to dignity. VGFN submits that a context-specific assessment of this question reveals this case is properly distinguished from the conclusion in *Corbiere*, including in many of the ways identified by the YKSC.[262] In particular, the Residency Requirement does not contribute to pre-existing disadvantage experienced by the Appellant as part of a group, and does not impose marginalization, stigma and stereotyping, which are the target harms addressed by s. 15.[263]

(a) The Residency Requirement does not perpetuate pre-existing disadvantage

154. The s. 15 analysis must ask, in a context-specific manner, whether the group of which the claimant is a member experiences disadvantage, and whether the impugned provision perpetuates that disadvantage. The YKCA erred in, again, reflexively following *Corbiere* to conclude that the group of which the Appellant is a member, is one subject to pre-existing disadvantage, prejudice or stereotyping. VGFN submits the conclusion in *Corbiere*, which addresses on-/off-reserve distinctions, does not speak to the unique circumstances of VGFN Citizens. There is no evidence of pre-existing disadvantage experienced by Citizens who do not reside within their Traditional Territory, where the traditional seat of their self-government has always been maintained under VGFN law. It is an error to characterize the group of which the Appellant is a member as identical to the group affected in *Corbiere*. Unlike in *Corbiere*, on the evidence before the Court, the Residency Requirement does not contribute to or exacerbate pre-existing disadvantage experienced by the Appellant as a non-resident Citizen.

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[259] *Fraser*, para 42; *Ontario v G,* para 47; *Withler*, para 39; *Kapp*, paras 15-16.
[260] *Fraser*, para 41.
[261] *Fraser*, para 76.
[262] YKSC Reasons, paras 145, 150-154.
[263] *Ontario v G*, paras 62-63.

155. VGFN submits that Indigenous people, including the Appellant, have been and are subject to discrimination within Canadian society by virtue of their identity as aboriginal people, arising from this country's harmful legacy of colonialism. However, Citizens residing outside of the Settlement Land are not, on the evidence before the Court, historically disadvantaged. Nor are they a group of VGFN Citizens subject to prejudice or stereotype within Vuntut Gwitchin society. As the YKSC concluded, at present, Citizens who reside in more urban settings have advantages with respect to opportunities and access to essential public services in comparison to Citizens residing on Settlement Land.[264] Recognizing this is not turning *Corbiere* on its head; it is a meaningful distinction governing its application.[265]

(b) The scope of the limit imposed does not lead to discriminatory effects

156. The nature and scope of the interest affected is a central question in determining whether an impugned provision has a harmful effect on substantive equality.[266] Whether the Residency Requirement discriminates must be considered in light of the governing system in which the impugned provision operates. The Court in *Corbiere*, in addressing the scope of the impact emphasized the need for "a system that recognizes non-residents' important place."[267] Here, under the *Constitution,* participation in self-government by Citizens is broad and inclusive: no matter where they reside, all Citizens are entitled to vote, run for office, and exercise authority in the GA and the Elders Council if applicable. Non-resident Citizens are more numerous than those residing on Settlement Land, so to the extent that non-resident voices require representation at the GA – the VGFN governing body with the power to amend the *Constitution* – they have a majority voice. Non-resident Citizens have central roles and political participation rights in VGFN self-government and the scope of the impact of the Residency Requirement on their democratic rights is very limited.[268]

157. The interest affected by the Residency Requirement is narrow. This is distinct from *Corbiere* where the rights to vote or to run for office were wholly denied to non-resident band members. All Citizens are entitled to vote and run for Chief or Councillor positions and to

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[264] YKSC Reasons, para 151; Dickson #1, paras 45-67, AR Vol. II, tab 5.8 at 62-66.
[265] *Lovelace v Ontario*, 2000 SCC 37, para 90.
[266] *Law v Canada,* para 74.
[267] *Corbiere,* para 95, L'Heureux-Dube J. concurring.
[268] YKSC Reasons, paras 68 & 145.

participate in the decision-making of the GA and Elders Council. Contrary to the Appellant's argument, there is no exclusion from participation generally and there is not a "total" exclusion from candidacy, but instead a limited effect *only* on those who are ultimately elected. That effect is to place responsibility on elected leaders to move residence to the Traditional Territory. Any burden is mitigated by the provisions made for housing assistance and income that are provided to ensure that the Chief and Councillors can practically relocate to Old Crow where housing availability remains scarce.[269]

158. The SGA provides that the "parties are committed to promoting opportunities for the well-being of Citizens equal to those of other Canadians and to essential public services of reasonable equality to all Citizens."[270] Given that other Canadian citizens elected in other jurisdictions must maintain residence in the place they are governing, on their face, opportunities "equal to those of other Canadians" means an opportunity to participate in the democratic electoral process with appropriate residency obligations. Citizens have collectively decided on their *Constitution* and their laws, including the Residency Requirement. They deserve opportunities equal to other Canadians, which include the ability to democratically pass electoral requirements that meet their governance needs and objectives.

159. Holding up Canadian election law more generally as a comparison, the YKSC found as fact that Yukon has a residency requirement for voting and running in the territorial election that requires 12 months' residence before the right to both vote and run for election.[271] That requirement – similar to many across the country for both legislatures and municipalities – was found to be permissible by the YKCA.[272] By contrast to most other jurisdictions, VGFN's *Constitution* and laws provide the right to vote and run for office to Citizens residing off-Settlement Land; accordingly the scope of the interest affected, considered in context, is limited.

160. VGFN submits that the Appellant's assertion of an internationally accepted democratic right to hold office no matter where a person resides in relation to the lands being governed is not sustainable.[273] The principle in the international instruments relied on is that the democratic right

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[269] YKSC Reasons, para 156.
[270] SGA, s 2.2, AR Vol. V, Tab 5.8 at 75.
[271] YKSC Reasons, para 209.
[272] *Re Yukon Election,* at 218.
[273] Appellant's Factum, paras 100-107.

to hold political office cannot be denied or restricted on the basis of personal characteristics such as race, sex, language, religion, political opinion, or other status.[274] There is no authority for the proposition that the mention of 'residency' in Comment 25 to the ICCPR, an interpretation document cited by the Appellant, could mean that a right to reside in any location whatsoever and to hold office has the status of binding customary international law. A right to reside anywhere and hold office is not referenced in the ICCPR or any related international or domestic human rights instruments.

161. The Appellant may be required to change residence if she is elected, and if so the requirement to move is mitigated by accommodations built in to VGFN policy. Given the limited scope of its impact understood in the whole context of the *Constitution* and VGFN self-government, the Residency Requirement does not give rise to substantive discrimination. VGFN acknowledges the Residency Requirement may create some personal burden, but submits that it also reflects a *responsibility* of Vuntut Gwitchin leadership which does not, in context, have the effect of perpetuating prejudice or disadvantage.

(c) The Residency Requirement is aligned with and promotes substantive equality

162. If an impugned law has an ameliorative purpose in relation to a group that has experienced disadvantage, this may inform whether the provision is substantively discriminatory. Contrary to the YKCA's reasoning, VGFN does not rely on the laudatory purpose of the Residency Requirement to shield it from scrutiny, the purpose being a central concern of s. 1.[275] Consistent with this Court's jurisprudence, the role of the Residency Requirement in VGFN's self-government – which is the promotion and maintenance of self-governance and connection to the homelands – is informative in the global assessment of whether it contravenes the claimant's right to substantive equality.[276]

163. In this case, the Residency Requirement forms part of the effort to address the effects of systemic discrimination and oppression against Vuntut Gwitchin. This provides context for the

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[274] United Nations Human Rights Committee, "*CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service"*, adopted July 12, 1996, CCPR/C/21, Rev 1, Add 7.
[275] *Fraser*, para 69; YKCA Reasons, para 112.
[276] *Withler*, para 38.

question of whether the impugned law causes substantive inequality. Here (as the YKSC found), non-residents of the Territory (more advantaged in some respects) are affected in a manner that corresponds with a greater collective need of a disadvantaged group. VGFN submits that requiring residency of its leaders does not perpetuate disadvantage of members of an oppressed group, and it does address the effects of discrimination experienced collectively.

164. After *Corbiere*, a series of cases have followed that decision and allowed review of residency requirements in election codes of *Indian Act* bands.[277] VGFN submits that given VGFN's distinct circumstances as a self-governing Indigenous people, as argued above, these decisions are distinguishable and not determinative of the question of whether the Residency Requirement is inconsistent with s. 15.

165. Not all distinctions give rise to discrimination. Understood in the full context of the legislative scheme, the Residency Requirement does not interfere with the Appellant's equality rights by perpetuating disadvantage or prejudice. Although Ms. Dickson is a qualified candidate who may be personally burdened by the responsibilities of leadership set by the community, the Residency Requirement does not give rise to substantive inequality within the meaning of s. 15(1). VGFN submits that respecting VGFN's ability to be self-governing and to maintain and strengthen their distinct legal order is consistent with resisting discrimination.[278]

D. The Residency Requirement is demonstrably justified in a free and democratic society

166. Section 1 provides that *Charter* guarantees are subject to such reasonable limits as can be demonstrably justified in a free and democratic society. The party seeking to rely on the impugned provision must show a pressing and substantial objective for the limit, and that the means selected to advance the objective do not disproportionately limit the s. 15 right. Proportionality requires a rational connection between the limit and the objective, that the limit be minimally impairing, and that the benefits of the provision outweigh negative effects.[279]

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[277] *Inter alia*, *Esquega v Canada (Attorney General)*, 2007 FC 878; *Joseph v Dzawada'enuxw (Tsawataineuk) First Nation*, 2013 FC 974; *Cardinal v Bigstone Cree Nation*, 2018 FC 822; *Clark v Abegweit First Nation Band Council*, 2019 FC 721; *Linklater v Thunderchild First Nation*, 2020 FC 1065.
[278] MMIWG Report, vol 1a at 181-224.
[279] *CP*, para 173, Kasirer J. concurring; *R v Oakes*, 1986 1 SCR 103 at 136-137.

167. The context of the impugned provision is crucial. The focus of the s. 1 inquiry must be "on the seriousness of the discrimination and its relationship with the underlying values in a free and democratic society". "[A] strong understanding of the interrelationship of equality, freedom and democracy under the *Charter* will provide the basis to distinguish between infringements which are reasonable and demonstrably justified" and those which are not."[280]

168. Neither of the courts below carried out a full s. 1 analysis in relation to the Residency Requirement as a whole. VGFN submits that a contextual approach requires assessment of what is demonstrably justified in a free, democratic and self-governing Vuntut Gwitchin Society. A proper application of the s. 1 analysis results a conclusion that the Residency Requirement is a reasonable limit within the meaning of s. 1.

1. The objective of the Residency Requirement is pressing and substantial

169. As held by the YKSC, the purpose of the Residency Requirement is to enhance the homeland and preserve it for all Citizens.[281] This purpose is enmeshed with the objective of pursuing meaningful and effective self-government by and for VGFN on their own lands, and in a manner that remains faithful to VGFN law. The objective is sufficiently specific, understood in the context of the harm it seeks to address, including the concern of collective dislocation. This objective is urgent, given the continual erosion of VGFN's land and culture as a result of Crown policy.

2. The Residency Requirement is rationally connected to its purpose

170. Requiring elected Councillors to be resident on Settlement Land is logically and critically tied to the goal of carrying out meaningful self-government in VGFN's homelands, and ensuring that the Vuntut Gwitchin way of life on the land remains viable for future generations.[282] It is important to VGFN that a governing leader of a self-governing Indigenous people, abiding by and advancing their system of laws rooted in their lands, be located in those lands. The provision furthers the aims of maintaining traditional place-based decision-making structures, such as the VGFN practice of deliberative assembly.[283] The provision of day-to-day governance and leadership in relation to the people of those lands also requires immediacy and presence in the

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[280] *CP*, paras 175 & 177, Kasirer J. concurring.
[281] YKSC Reasons, para 153.
[282] Final Agreement, 9.1.1, AR Vol. III, Tab 5.8 at 167.
[283] Tizya-Tramm, para 22, AR Vol. VI, Tab 5.10 at 139-140; YKSC Reasons, para 12.

territory, and takes into account the relative remoteness of the Settlement Land and the cost of travel.[284] The requirement for connection of a representative to the governed jurisdiction is consistently expressed in non-Indigenous electoral rules.[285] It is no less essential in the context of Indigenous laws being carried out through Indigenous self-government on Indigenous lands.

3. The Residency Requirement is minimally impairing

171. Under s. 1, the means chosen to achieve an objective are given a measure of deference.[286] This margin of appreciation is particularly important where, as here, "the measure seeks to balance legitimate competing social values."[287] The burden imposed by the Residency Requirement, again understood in context, is limited. Contrary to the Appellant's submission, the Residency Requirement is not a form of total exclusion. Unlike in *Corbiere*, the Residency Requirement does not impose any denial of electoral rights such as the right to vote or the right to run for election. Nor does it impose limits on participation in VGFN self-government available to all Citizens through the GA and the other governing bodies of VGFN.[288]

172. While there is a burden on non-resident Citizens who must move to reside on the Settlement Land for the course of their service once elected to Council, this is mitigated by other aspects, including that there is a guarantee of housing and that a guaranteed salary for the four-year term.[289] VGFN submits that the means chosen by the GA, which expanded eligibility, appropriately balance the competing interests of maximising opportunities for participation and maintaining consistency with VGFN legal tradition and pursuit of self-governance.

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[284] Tizya-Tramm, para 24, AR Vol. VI, Tab 5.10 at 140; Josie #1, paras 23-25, AR Vol. VI, Tab 5.11 at 164-165.
[285] *Legislative Assembly Act*, ss 4, 8, referentially incorporating *Elections Act*, ss 3(c), 6(1)(b); *Municipal Act*, ss 48(1)(c), 50(1), 193.04(a)(iii); YKSC Reasons, para 209.
[286] *CP*, para 179, Kasirer J. concurring; *Quebec (Attorney General) v A*, 2013 SCC 5 [***Quebec v A***], para 439; *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199, para 160; *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, paras 37, 53.
[287] *CP*, para 194, Kasirer J. concurring; *Quebec v A*, para 439.
[288] YKSC Reasons, para 68, 145; Dickson #1, para 24, AR Vol. II, Tab 5.8 at 58; Tizya-Tramm, paras 17-20, 26, AR Vol. VI, Tab 5.10 at 138-139, 141; *Constitution*, Articles VI, VII, XII, XIII, AR Vol. VIII, Tab 5.13 at 138-140, 143-144.
[289] YKSC Reasons, paras 44, 156.

4. The benefits of the Residency Requirement outweigh any negative effects

173. To the extent that the Residency Requirement imposes a burden on Citizens who have been elected to Council, that burden is outweighed by the benefits of the provision. The benefits of the Residency Requirement include its role in supporting self-government by maintaining the connection of VGFN self-government to VGFN lands. Meaningful land-based self-government, in turn, contributes to the amelioration of the effects of dislocation of Vuntut Gwitchin from control over their Traditional Territory. These benefits outweigh a relatively modest burden on a successful candidate.

174. The YKSC concluded that it cannot be discriminatory to require an elected lawmaker to reside in the Settlement Land which will be the primary focus of their legislative function and constitutional duties.[290] In VGFN's submission, it cannot be said to be disproportionate under s. 1 to impose the Residency Requirement on a successful candidate who will be responsible for exercising VGFN's self-governing authority in respect of those lands. Across Canada, electoral laws require residency – in order to vote, run or govern. If the *Charter* is to be imposed on VGFN's system of government without its consent, which VGFN submits would be in error, VGFN should at a minimum be entitled to make laws for the selection of its governmental leaders similar to those of other jurisdictions subject to the *Charter*. It would establish a blatantly discriminatory system not to afford VGFN the deference to legislative choice afforded to essentially every other government. The Residency Requirement strikes an appropriate balance between individual Citizens' interests in participation, and the collective interests of the VGFN in pursuing self-government in a manner consistent with both their inherent rights and their modern governance needs.[291]

E. Conclusion

175. VGFN respectfully submits that the Appellant's claim must fail. An interpretation of each of the provisions of the *Charter* at issue in this appeal calls for an approach that respects and defers to VGFN self-governance. As stated by Elder Robert Bruce Jr.: "it is important that the Vuntut Gwitchin have a chance to resolve these questions in our own ways."[292] To advance reconciliation,

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[290] YKSC Reasons, para 156; *Constitution*, Article IX, 3(h), AR Vol. VIII, Tab 5.13, at 141.
[291] YKCA Reasons, para 161.
[292] Bruce, para 9, AR Vol. VI, Tab 5.9 at 114.

the autonomy of Indigenous peoples to define themselves must be acknowledged and respected, and their Indigenous legal orders given space to live and flourish.

PART IV - SUBMISSIONS CONCERNING COSTS

176. VGFN seeks costs throughout.

PART V - ORDER SOUGHT

177. VGFN respectfully asks that this Court order the Appeal dismissed and Cross-Appeal allowed, with costs to VGFN throughout.

PART VI - SUBMISSIONS ON CONFIDENTIAL INFORMATION

178. There are no sealing or confidentiality orders, publication bans, classification of information in the file as confidential under legislation or restriction on public access to information in the file that could have impact on the Court's reasons, if any, in the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Vancouver, in the Province of British Columbia, the 19th day of September, 2022.

Kris Statnyk

Krista Robertson

Elin Sigurdson

PART VII - TABLE OF AUTHORITIES